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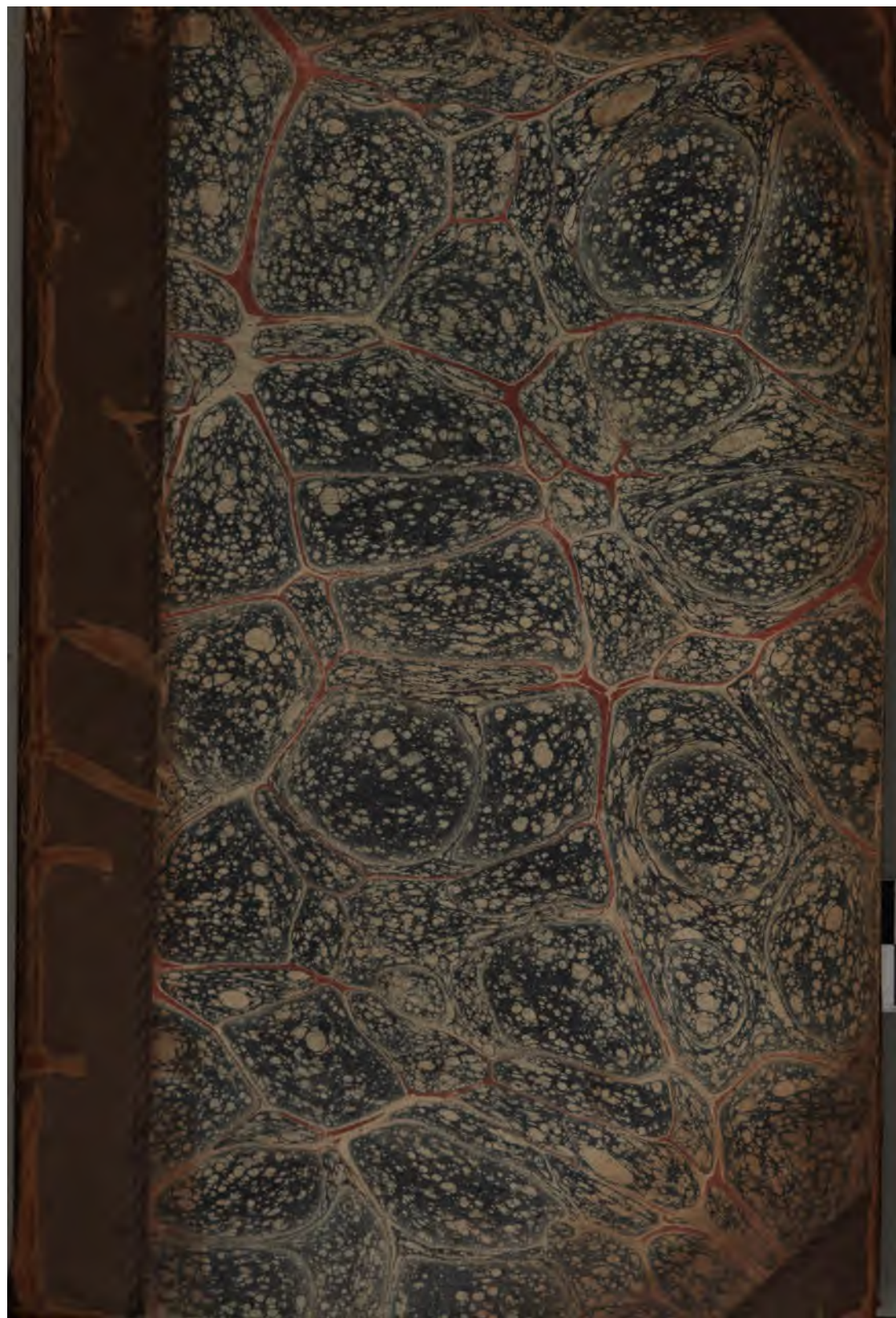
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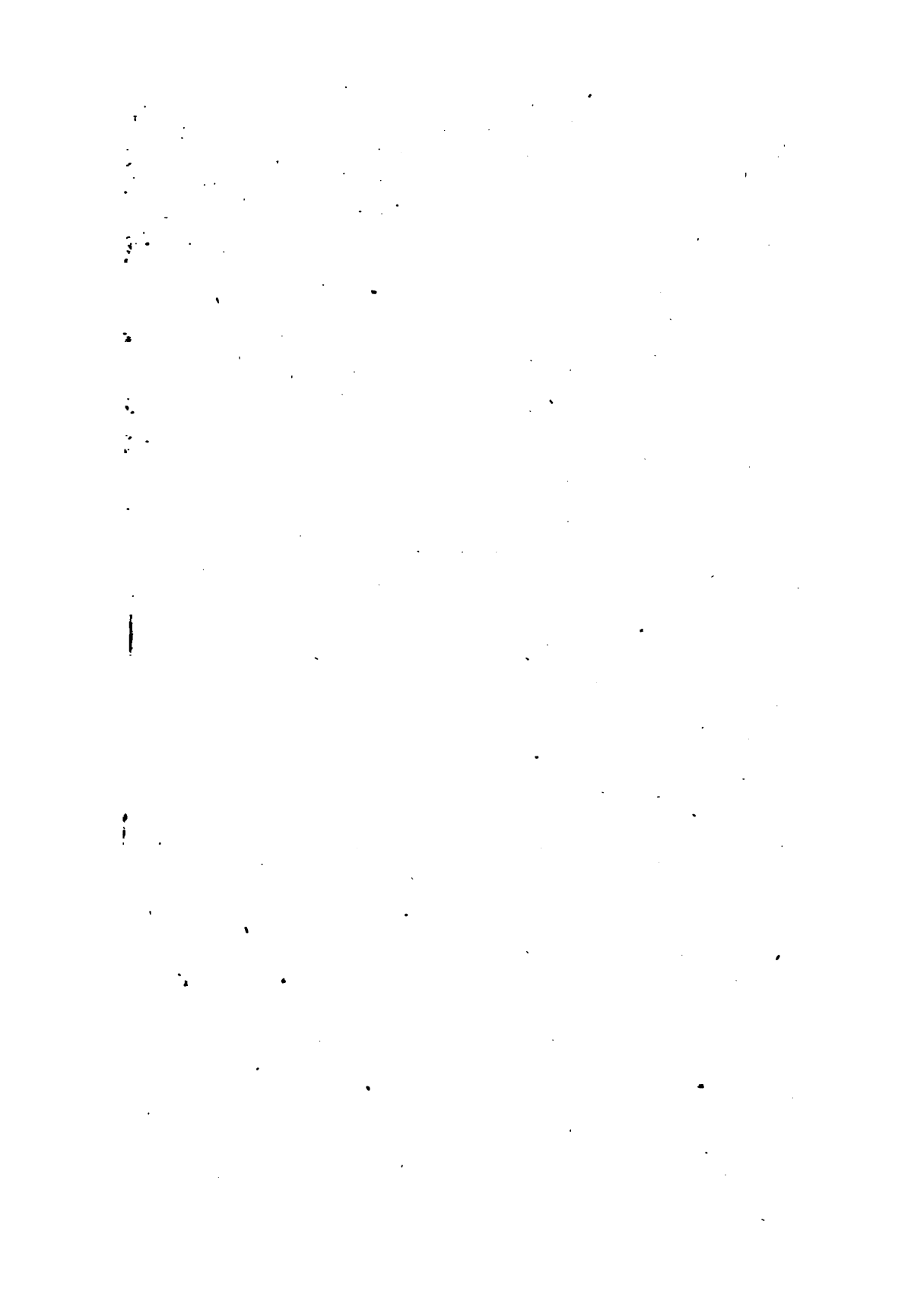
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INQUIRY

INTO

**EQUITY PRACTICE,**

AND

**THE LAW**

OF

**REAL PROPERTY,**

WITH A VIEW TO

**LEGISLATIVE REVISION.**

---

**BY RALPH BARNES,**

**OF EXETER.**

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**LONDON :**

**J. & W. T. CLARKE,**

**LAW BOOKSELLERS AND PUBLISHERS,**

**PORTUGAL STREET, LINCOLN'S INN.**

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**1827.**

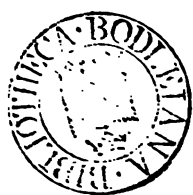
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**HABET** Rex curiam suam in concilio suo,  
in Parliamentis suis, presentibus prelatiis, co-  
mitibus, baronibus, proceribus, et aliis viris  
peritis, ubi terminatæ sunt dubitationes judi-  
ciorum, et novis injuriis emersis nova con-  
stituuntur remedia.

**FLETA.**



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## AN INQUIRY, &c.

### INTRODUCTION.

CONSIDERING the Law of England to be founded on the free compact of a free People, viewing the Common Law as the result of natural reason, applied to the actual state of Society in this particular Country; we must contemplate the Law as always capable of improvement by experience, and subject to change with the progressive variation of the manners, wants, and habits of the People.

A Review of the sources of the Common Law, as far as the light of history will enable us to discover them, may lead to a better understanding of its principles and of its present practice; but History can rarely be assumed as a safe guide in the application of the Law to the existing state of our Civil Constitution. It is the glory of England, it is the principle on

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The principle of ~~law~~ is ~~not~~ a part of human law, and it is the duty of the Lawyer to point out their defects, and endeavour after a remedy. It is to watch over and assist the pure administration of Justice, and to cultivate obedience to the Law as



it exists. It is in such a train of thought, and with such views, that I have been induced to enter upon some general considerations on the actual state of the law of real property in England, and on the practice of our Courts of of equitable Jurisdiction, with a view to explain defects, and facilitate a remedy. The field is much too large, to permit me to indulge a hope that the subject can be satisfactorily elucidated, in that familiar manner in which alone it can become of general interest; at the same time, I am convinced that no partial view of insulated principles, or mere examination of points of practice in detail, would ever enable the general reader to apprehend the true merits of the case, or put fairly before the Legislature and the public, the entire subject to which their attention must be directed.

The course that I purpose to pursue is, after some general observations, on the best mode of amending our Laws, to examine in detail the several more prominent defects, and the remedies which have been proposed; adverting incidentally to points as they may occur, without strictly confining myself to the more immediate subjects of this inquiry.

## CHAPTER I.

### *On the Amendment of the Law.*

THE true province of Law is not to contradict, but to regulate and assist men in a legitimate and proper use and dominion over Property. Experience is the only sure guide to ascertain the convenience or inconvenience of any particular rule by which that use and dominion is governed. If any inconvenience exists, apparently admitting of a remedy, its true cause must be sought, in some vicious state of the Law itself, and not merely in abuses in its administration. If a law administered as all human laws must be, proves faulty in its operation, it is idle to attribute the evil to its defective administration. The Law must be corrected to suit the people for whose government it is designed ; it must be such as may be effectually put in operation by persons of that class to whom it falls to be administered.

The Law of every country is considered as

founded on the principles of natural reason and justice. The general features of the Law ought therefore to be easily comprehensible by men of moderate attainments. Subtilty and mystery should studiously be avoided, and every regulation which tends to lay open to the people the rules by which their rights and property are protected, will not merely foster their attachment to the Constitution from which it emanates, but tend essentially to maintain a due observance of the Law itself, and more effectually to counteract chicanery in its practice, than any general rules of the most strict and positive obligation, however wisely framed and diligently enforced.

I would by no means be understood to infer that either refinement in principle, or complication in process, are prominent defects of the Law of England. Perhaps there is no code, antient or modern, where the whole body of the Law is more readily deducible from the simple principles of justice, and less fettered with legislative detail; and certainly there is no Country where the rights of liberty and property are more positively secured, and injustice has less chance of success.

That which is so often the subject of complaint, the voluminous Commentaries and Judicial Decisions, explaining the application of our



which our Liberties are founded, and by which they are secured, that the Law is subject to be moulded by the free voice of the Country, so as best to suit the varying state of society. It is any thing but a subject for regret, that the Law of England consists of written and unwritten precepts, that it combines the wisdom of successive ages, applied to remedy particular defects, and to meet new circumstances, instead of professing to be the code of any prince, or the statutes of any one age. It is by such means that its best qualities and just principles have become habituated to the People, identified as their own, and consecrated by all those ties that attach a Briton to his native soil. But it is a necessary corollary from such a view of the subject, that the Law must continually stand in need of temperate and cautious amendment, avoiding equally an impatient interference with antient maxims and settled rules, and a too rigid adherence to forms or principles which time may have shewn to be faulty, or inapplicable to the existing wants of society.

The principle of change is inherent in every part of human Laws, and it is as much the duty of the Lawyer to point out their defects, and endeavour after a remedy, as it is to watch over and assist the pure administration of Justice, and to cultivate obedience to the Law as

it exists. It is in such a train of thought, and with such views, that I have been induced to enter upon some general considerations on the actual state of the law of real property in England, and on the practice of our Courts of of equitable Jurisdiction, with a view to explain defects, and facilitate a remedy. The field is much too large, to permit me to indulge a hope that the subject can be satisfactorily elucidated, in that familiar manner in which alone it can become of general interest; at the same time, I am convinced that no partial view of insulated principles, or mere examination of points of practice in detail, would ever enable the general reader to apprehend the true merits of the case, or put fairly before the Legislature and the public, the entire subject to which their attention must be directed.

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Laws, and the want of positive and direct statutory enactment, is rather matter of praise than regret. To suppose that the spirit of litigation could be subdued by any Law, is visionary; and the decision which emanates from the collective experience, and intent application, of those whose lives have been devoted to this one study, applying the known and established principles of the Law to the circumstances of each particular case, will in a general view give much more satisfaction, than that which would be derived from the unbending language of a written Statute. It is for this very reason, that we ought anxiously to seek to clear from all mystery, every proceeding in our Law. And it will be easy to demonstrate, that there exist various intricate forms, and indirect proceedings, originating in endeavours to mould antient rules to modern wants, the preservation of which can answer no useful purpose;—and that a large portion of legal proceedings might and ought to be brought more into general view, and made more plain and intelligible to the public understanding.

The inquiry that has lately been instituted into the practice of the Court of Chancery, embracing as it does, in its jurisdiction, every description of property, under every variety of circumstance, cannot fail to be of the highest



importance in the consideration of the present subject.—The object of that inquiry is more immediately directed to the delay and expence in the proceedings of Chancery, but incidentally, every matter which comes under the power of that Court is introduced ; and besides, that the regulations which the report proposes, go to affect the whole Law of property, it contains a direct recommendation that the Law relating to the transfer of landed property should undergo a revision. Indeed it cannot fail to be the result of every inquiry into the inconveniencies of the administration of the present Laws of property, that a large proportion of delay and expence arises from defects in the Law itself.

I propose then to commence the present inquiry with a consideration of that report, and of the various incidental subjects interwoven in its propositions, or naturally connected with its details ; and so extensive is the range of inquiry upon which that report is founded, that there is scarcely a point connected with my present object which it will not incidentally introduce.

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## CHAPTER II.

### *On the substitution of a new Code, for the present Law of real Property.*

THE mere institution of the inquiry into the practice of the Court of Chancery, proves the existence of public inconvenience, and the result affords grounds amply sufficient to call on the Legislature to adopt the most effectual means of ascertaining the extent of the evil, and the practicability of a remedy; to simplify and enforce those principles of Law established in our Jurisprudence, which are consonant to justice and common reason; to legalise, in a direct way, all existing usages that are agreeable to right; and to make the proceedings of Courts applicable in the most familiar manner to the administration of property; are the legitimate objects of the Legislature, in proceeding to reform the Civil Code of this Country.

Such a reform is not to be affected by any attempt to reduce the Law into one *Code* of positive rules, whether considered as embodying

leading principles, or editing regulations in detail. The principles of the Law of England are best secured, and best understood, by their emanating from the authorities on which they at present rest, a train of Judicial Decisions. And in matters of mere practical regulation, however desirable it be to simplify and consolidate, it appears preferable to leave the particular detail to judicial discretion, expressed in rules of the Court, which may be adapted from time to time to actual habits of business, and to the characters by which the machinery is to be worked.

The Code of England is already established, —fortified by all that is dear to us in history, and justified by the progressive improvement of the country, in all that is liberal, just, and honourable; and he must indeed be bold in legislation, who could imagine the possibility of superseding it, by the application of all the talents, and all the industry, which any, the most enlightened age can afford. But to be guarded against misconstruction, I would by no means be understood to oppose all large and effective alterations of the Law, merely because they are extensive. Wherever a change of the Law will in its consequences effect an extensive reform, it is, for that reason in itself, much preferable to a multitude of minute regula-



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leading principles, or editing regulations in detail. The principles of the Law of England are best secured, and best understood, by their emanating from the authorities on which they at present rest, a train of Judicial Decisions. And in matters of mere practical regulation, however desirable it be to simplify and consolidate, it appears preferable to leave the particular detail to judicial discretion, expressed in rules of the Court, which may be adapted from time to time to actual habits of business, and to the characters by which the machinery is to be worked.

The Code of England is already established, —fortified by all that is dear to us in history, and justified by the progressive improvement of the country, in all that is liberal, just, and honourable ; and he must indeed be bold in legislation, who could imagine the possibility of superseding it, by the application of all the talents, and all the industry, which any, the most enlightened age can afford. But to be guarded against misconstruction, I would by no means be understood to oppose all large and effective alterations of the Law, merely because they are extensive. Wherever a change of the Law will in its consequences effect an extensive reform, it is, for that reason in itself, much preferable to a multitude of minute regula-



tions.—The point for attentive and cautious consideration is, whether the alteration may undesignedly overturn, or throw into doubt, some acknowledged and approved principle, in connection with that part of the Law which alone the amendment is intended to affect; whether it may destroy or impair the fixed character; whether it may weaken or obscure the essential qualities of any part of our venerable constitution and legal polity.—But a general aversion to all extensive amendments, merely as such, is in direct contradiction to the true spirit in which the subject should be presented to our consideration. Great and important are the changes which time has effected in our jurisprudence, and as necessity at any period occurs, as inconvenience at any age is felt, invention will never be wanting to supply the remedy. The change will take place, whether aided by the Legislature or not; only, if not so assisted, the change has generally been effected in some circuitous and indirect manner, involving fictions so idle and useless, that the inconveniences resulting from them must ultimately force from the Legislature, that direct sanction which might with safety and advantage have been hazarded long before.

No one can be conversant with the history of our Law, without readily calling to his mind

numerous cases of this description.—It will be sufficient to remind the Lawyer of the forms, fictions, and inventions of common Recoveries and Ejectments ;—nor is the evil, and its origin less apparent, in the history of trusts, and the doctrine of disseisin and tortious Conveyances. It is no less clear, that the present Constitution of the Court of Chancery, in the way in which its machinery actually works, is not adequate to the increasing business of the country, and that its rules of proceeding are in many essential points not practically adapted to the speedy or effectual administration of justice, in a large mass of those cases which are at present open to no other remedy. If this be true, and the Legislature refuse to interfere, it can only tend to drive men to new and more complicated inventions, to make the people uneasy under the administration of the Laws, and ultimately to make the alteration more violent, and less consonant to the desires and wants of those whom it is designed to benefit.

It is of the first importance that all Legislation, which is to affect the properties and the rights, the character and habits of the people, should not attempt to precede public opinion. It is equally clear, that it ought to interfere to regulate and legalise the just result of that opinion, as soon as it be deliberately and un-



equivocally expressed. It is not while the machine is working well, that the Legislature is now called on to interfere. The result of the inquiry under the Chancery commission, whatever be its merit as a remedy for the evil, contains in every page a proof or admission of the existence of unnecessary delay and expence, in Chancery proceedings,—and has, in a language equally plain and express, called for Legislative interference, to correct the evils arising from the existing state of practice, in the conveyance of real property.

It is quite impossible for any man to contemplate the machinery of our Courts of Equity, applied equally to all suits within its cognizance, without reference to the value of the property, or situation of the parties; to be the least conversant in the mysteries of conveyancing; to have ever been implicated in a complicated title; to have been entangled in the administration of the effects of a deceased friend; or to have had to seek for satisfaction of a debt, out of property under the controul of the Court; without acutely and indelibly feeling, that however high and imposing the ultimate decision, however just the long expected judgment, the process by which it is attained is not so plain as is ought to be, does not arrive at its results in the most direct road,

is not convenient to the common concerns of life, and is, on the whole, not satisfactory to the public mind.

The necessity, not of enquiry only, but of effectual amendment, being conceded, the spirit and mode in which that reform is to be conducted, is a matter of deep interest and important consideration. The nations of the continent have successively undertaken the reducing the Law to one Code or complete written system, professing to embrace and lay down under distinct heads, the principles by which every right is to be governed, and the mode by which every wrong is to be redressed. The spirit of revolution in civil rights, wide and extensive as it has proved throughout Europe, has been invariably, and we may therefore concede necessarily, accompanied, with the spirit of reform in the code of Civil Law. But the dangerous part of that spirit has, in England, we trust, long since *had* its existence; the principles of our Civil Code have stood the shock; and every succeeding age has contributed to elucidate, confirm, and perpetuate the inimitable system of the Common Law.

It is not therefore necessary to spend much time in enquiring how far the system of modern code has succeeded, because it is demonstrable, that in England, such a scheme is not prac-



licable. The Common Law is our birth-right, an Englishman feels and knows it.—Arguments against its existence, as a whole, will be utterly vain and powerless; and could we contemplate their success, so far as the actual publication of a Code, as the legal Charter of the Country, who is he that shall ensure the acquiescence of the people; and what British Statesman will dare incur the fearful hazard of its rejection? But it may be useful to consider, how far it is desirable, that the *spirit* of a Code should be gradually infused into British Legislation.

Frederick, in his Prussian Code, haughty as are the terms in which it is dictated, took a short way to compel its unmixed and intire adoption. The Code itself is rather more like a legal treatise than a Law, and professing to contain in itself the best rule on every point, he prohibited at once all comment and all explanation. With regard to the French Code, it is a work worthy of a great and highly civilized nation; but the ground upon which it rests, is essentially different from the foundation of the Law of England; and the superstructure it would erect may be considered as being here already built. The Law of France consisted in a great measure of distinct provincial customs, which it was an object of the Code to consolidate; the Law of England, except in some unimportant dis-

tinctions, is already an universal system; the supreme Courts of Law and Equity here, are already bound by one uniform rule, resting on the foundation of the acceptance of ages, and whose value consists in its own inherent quality of progression with progressive civilization.—The Code of France has not in fact superseded the antient Laws; local customs and ordinances are still in force, upon all points on which the Code is silent, and the science and experience of Law is equally necessary there, to explain the Code, as it is and ever must continue to be here, to understand and administer the Law of England. The Kingdom of the Netherlands is a new State, and what may be not only practicable, but almost necessary there, what might be of use if we were forming a Code, can be of no serious avail as an argument for the adoption of a similar scheme here.

If we are to be reminded of the voluminous pile of our reports, I would answer, that they constitute a practical commentary in its most convenient form. What can be more satisfactory in the applying the Law to a particular case, than to search out decisions upon similar cases? The necessary distinctions arising in the application of principle to the practice of mankind, cannot be so conveniently elucidated in any other form. I cannot therefore discover



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the wisdom of consigning to oblivion one pile, for the mere pleasure of rearing another. We are taunted with the accumulation of Statutes: surely this is an evil of easy cure, we may simplify, repeal and consolidate; and the mere existence of a law subjected to the test of experience, tends less to embarrass than to assist the Legislator. It never was found practicable to reduce even the Roman Civil Law, when the will of one man could constitute the law, to any thing like a simple Code, so as to exclude either the materials upon which the Code was founded, or voluminous commentaries for its explanation.

Were authority wanting, and the time and space convenient, it would be easy to shew that all our best text writers, from Glanville to Blackstone, that Fortescue, Bacon, and Hale, have viewed the Common Law as liable to continual reform; but its principles and practice as too valuable to be exchanged, its foundation too sacred to be touched.

By some, any argument against the attempting to supersede the law of property by a new Code, may be deemed superfluous; but it has been proposed, in a work of that force which cannot be disregarded, by *Mr. Humphreys*, and is a point upon which we ought to come to some conclusion, before we can enter with advantage on the consideration of amendments in detail.

### CHAPTER III.

#### *Historical Notice of Amendments in the Law.*

IMPRACTICABLE however as it would be, to subject the Law of England to an entire new arrangement, the same line of argument that would interdict such an attempt, goes powerfully to enforce the importance of amending, as amendment may become necessary; and to the maintaining of that character of accommodation to times and circumstances which is its peculiar excellence, as the Code of a free people. The only legitimate object in any amendment of the law of England, is rather to repair the superstructure, than to alter the foundation; to remove useless branches, and leave the root untouched. The amendment however may proceed with too cautious, as well as too bold a hand, and thus the attention be distracted by trifling alterations, without adverting to the true origin of the inconvenience.

There have been remarkable eras in our



history, when more than common attention has been paid to the state of the Laws. Whatever be the origin of the common law, it existed before the conquest, engraven in the hearts of the People. The Feudal System then established, placed the power of property in the hands of the Nobility, and occasioned struggles ending in the settlement of our free Constitution.

All historians concur in fixing on the reign of the first Edward, as the period when the Law of England assumed that decided character which is, to this day, its glory and security. The more important improvements of the Law during that reign, consisted in—that plain and explicit declaration, that the will of the giver, expressed in the gift, should be observed;—that all men might buy and sell lands at their pleasure, without the controul of the Chief Lord under whom they were holden;—that final agreements, under sanction of the Court, founded on litigated rights of land, should be conclusive;—that the goods of an Intestate should be liable to his debts, and executors be invested with full power of administration;—that merchants should have a ready remedy for debts, and land become attachable by all creditors. The boundary between the temporal and ecclesiastical jurisdiction was also defined but what most of all contributed to fix the

present peculiar character of the Law, —that judges should regularly go the circuits in the vacations, charged effectually to finish the business of the country—moreover, that in any instance in which the Law had not provided a specific writ, the Chancery should make a writ applicable to the case, so that no right should remain without its appropriate remedy. To this Monarch also we probably owe the introduction, as a distinct profession, of the Attornies and Apprentices of the Law.

The next important era was that of the Reformation, when the spirit of freedom which produced that great revolution, evinced a desire effectually to submit real property to free disposition by the Statute of Wills, and by the Bankrupt Law, to the attachment of creditors. The period from the restoration to the reign of Queen Anne, was one adorned by characters of the highest legal attainments, and every Act proceeded in the true spirit of legislative amendments. The legislative enactments, from that period, to the commencement of the present reign, bear more the character of insulated rules, deficient in depth of remedy; often serving only to create new distinctions, where they should have removed the ground of the distinction altogether; or to engraft new matters of regulation upon a law inherently



vicious. But during the same period, the current of judicial decisions has been all in the right line of solid and substantial justice. Antiquated distinctions have been disregarded, mistaken decisions have been corrected, fraud and chicanery have been reprobated, and all the safeguards of property and character maintained, with an authority which none will question; because it has, in itself, commanded the support of public opinion.

In adverting to the line of argument which has been adopted against a Code, there are inferences which I am desirous to guard against, and disclaim. To consolidate the various written Laws on one subject, and to reduce into a system the different enactments made to correct particular inconveniences, to abrogate obsolete provisions, and enforce those which are sanctioned by experience, and found practically beneficial, is peculiarly the province of the British Parliament. If ever there was an assembly, calculated in its constitution to preserve the due connection between the laws and the people; to make the Laws respected, because they are beloved; and freely enforced and obeyed, because they are congenial to the character of the Constitution, it is the British Legislature; and if ever there was an era, when the earnest attention of Parliament might

with brighter prospect of advantage, be directed to an object so interesting, it is the present.

The universal approbation which has attended the modern system of consolidation, and the practical benefits resulting from it, offer a source of encouragement the most satisfactory. And a further simplification of the Law on many equally important, though perhaps more difficult subjects, an assimilation of practice in courts of concurrent jurisdiction, and a more intimate identification of the law and of the modes of legal procedure with the hearts and understandings of the people, would be hailed as an important blessing by a grateful nation. And not in this island alone, but in all those distant settlements where Englishmen have carried English jurisprudence, to govern rising states, and improve the character and condition of less civilized parts of the world.

The classification of the Revenue Laws, the reform of the Criminal Law, the consolidation of the Bankrupt and Insolvent Laws, the regulation and simplifying of the Law of Juries, all undertaken within these few years, are indeed a work worthy of the British Nation, and cannot ultimately fail to prove the practicability of applying the same energy, with the same cautious deliberation, to the improvement of the law upon other, and in their gene-



vicious. But during the same period, the current of judicial decisions has been all in the right line of solid and substantial justice. Antiquated distinctions have been disregarded, mistaken decisions have been corrected, fraud and chicanery have been reprobated, and all the safeguards of property and character maintained, with an authority which none will question ; because it has, in itself, commanded the support of public opinion.

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ral effects, more extensive subjects. At the same time, many important amendments have been silently introduced into the Law of Property and Obligation ; and inquiries of a decided character have been in progress into the practice of the several Courts of Justice, and the expences attending legal proceedings,—inquiries which must inevitably lead to extensive reforms in the general administration of Jurisprudence in every part of the United Kingdom. Who that is attached to our venerable Church, but will look with deep interest to the important regulations which a few years have introduced into her internal polity ; and who would not desire to see the attention of the Legislature directed to every matter connected with her welfare, that shall better serve to maintain her independence, as part of our own, and to conform her rules to the wants of an increasing population? What statesman can view with unconcern, the evident uneasiness of the people under the present dilatory and expensive administration of the law of property in the courts of equity?—I would not willingly use too strong an expression, but that the delay and expence are excessive, and being so, that the matter demands a remedy, however men may differ as to the mode of that remedy, none will



be bold enough to deny. In Scotland both the inquiry and the amendment have proceeded with a dispatch which an Englishman may well envy; and the store of information that has been thus laid open to the English Lawyer, the practical use to which it may be converted in the progress of reform in the law of England, cannot fail to arrest the attention, and assist the labours of those to whom the task of that reform may be confided.

The assimilation of the Laws of the sister parts of the Island, is a subject most worthy of serious attention. It must be distant in accomplishment; but if Scotland has been progressively incorporating into her Code the maxims and rules which English experience has justified; if in that course, she has improved many a point of jurisprudence, at the same time that she has found difficulty in conforming the new rule to the old, and in availing herself at once, of all those benefits of which it has been the parent here; Scotland can at the same time boast of a comparatively cheap and expeditious mode of justice; of forms adapted to practical effects, in a direct way; of proceedings well calculated to ensure the trial of the real merits of a case in an intelligible manner; and many matters of regulation and detail in the execution of the Law, which England might well turn to her



profit and advantage. For instance, the number of judges to do the business in Scotland, is quite out of proportion to the number in this country. Take away the disadvantage of contention, and contrariety of opinion, to which a number of judges sitting together, above what is proper to give weight to decision, is liable; and the dispatch obtained by an increased number on the bench, is so much positive good, without any alloy, other than the mere additional charge to the country.

The high judicial character of this country must be upheld; the standard of judicial authority and independence must not be lowered; it is *that* which alone can account for the people having so long submitted to the inconveniences of which they complain. But an addition of a fifth judge to our three courts of Law, a mere restoration of antient practice; a more equal division of the labour among those courts, a matter certainly of no difficult regulation; the further assisting the Chancellor by one or more judges of equal dignity with those already presiding in that Court; would be no infringement upon those principles of authority and independence. The effect of converting the Masters of the Court of Chancery into judges, so as in any degree to allow them to decide without appeal on any matter involving the legal merits

of a cause, is a scheme of more doubtful policy and an innovation requiring much caution and deliberation.

I have been led into this discussion, before the subject naturally required it, but the whole effect of any alteration of the Law, and of any amendment in practice, so much depends on the *Judicial* arrangements, that this point cannot be out of place in any and every part of the present inquiry.

Several modern regulations have been made in the administration of justice in *Wales*. It is a defect, I speak it with deference, in the judicial polity of that country, that it is administered by judges inferior in dignity to the bench of England. The Law of England is the Law of Wales;—the distinction exists only in the forms of judicial proceedings. The preserving of a distinct Court there, with the existence of a concurrent jurisdiction in the English Courts,—a Court too, whose powers exist only periodically, during its Session,—is a course which appears to combine many disadvantages with little of particular convenience. Local jurisdictions for debts and demands of small value, where the proceedings are prompt, and the trial is by a jury, before a judge of competent experience, with power to enforce the judgment, without reference to local limits, are

congenial to the original genius and spirit of our Law, and the establishment of which must form an important feature in any general scheme of reform. Upon the same ground, with reference to the Equity Jurisdiction of the Courts of Sessions in Wales, every reform in Equity practice in England, which shall tend to carry its administration into the heart of the Country; to lay open its proceedings to common understanding; and identify public opinion with its operations; will be of essential service towards the making Equity proceedings more in accordance with the habits of the people. But every Court ought to be open at all seasons, or at least with short intervals, and it is only the examination and trial of the merits, not the legal pleadings, which there is any advantage in conducting in the Country. The genius of our legal Constitution mainly consists in the submitting the merits, the facts, and circumstances of the case, to the public verdict, guided in matters of Law, by direction flowing from the highest authority, and most unsuspected impartiality. It is this peculiar character which ought to be kept in view, in the regulation of every proceeding in a Court of Equity; opposed as the general character of its practice must always be, to the valuable qualities of publicity, simplicity, and notoriety.



The addition which has been suggested to the number of judges in England, would afford the means of including Wales in one general system, merely as one or more additional Circuits.

With regard to *Ireland*, possessing as it does a judicial establishment perfectly distinct, but governed by the same Law, it will be assumed that all matters of general regulation will be equally applicable to that country; but there are and will long continue to be many topics indesuetude here, which must there remain the subject of detailed legislation. It may be desirable at some early period to classify, in a separate volume, all enactments relating solely to Ireland.

In respect to such of our *Colonies* in which the Law of England has been wholly or partially adopted, the inquiries lately instituted under the authority of the Crown, into the practice of those Courts, cannot fail to be of the most essential utility, in the putting their judicial establishments on a footing adapted to the particular circumstances of each country. Every attempt to render more intelligible the proceedings in our own courts, and to subject them to such regulations as experience may have shewn to be best for the attainment of Justice, must prove of the highest importance



in the regulation of Courts similarly constituted in our Settlements. And if so many judicial establishments look to England for their guide, of what paramount importance is it, that our practice should be periodically corrected to meet the extensive purposes to which it is subservient.

Such are the observations which occur in the outset, upon any general systematic proceeding to reform and simplify our Laws. The spirit of such a reformation is abroad, and could it be well directed, and steadily pursued, it might prove the glory of the present age, and a blessing to posterity.

To proceed to the immediate subject of the present inquiry, it will be most convenient to consider first, in a connected view, the Report of his Majesty's Commissioners. appointed to inquire into the practice of the Court of Chancery.

## CHAPTER IV.

### *Analysis of the Chancery Report.*

#### *First Part—The Practice of the Court.*

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THE Jurisdiction of Equity proceeds upon *Petition* of the party grieved, stating the grievance, and the defect of remedy at common law. The source of extension of the jurisdiction of Equity, is to be attributed to the mode of disposing of property in the form of *Trusts*; the power of disposition of all property by *Will*; the difficulty of obtaining justice at common law in matters of *Account*; the demand of justice, in case of *Fraudulent contrivances*, *Waste*, and the *Specific execution of contracts*. Exclusive of matters properly belonging to Chancery, as a Court of Equity, the Chancellor is entrusted with the sole jurisdiction of *Bankruptcy* and *Lunacy*, assisted therein by the Vice-Chancellor and Officers of the Court. The Chancellor has also various duties in matters State, and attends all judicial business by appeal in the *House of Lords*.

The plan of proceedings in Equity is calculated to secure the sound administration of justice, but some alterations may be beneficially adopted, which may be less extensive at first, to pave the way for more enlarged improvements hereafter. And admitting some defects; much misconception has prevailed,—for much of the delay is imputable neither to the Court, nor its practice, but to the carelessness, obstinacy, or knavery of parties, or the inattention or ignorance of agents.

The term *delay*, as applied to proceedings in Equity, has been much misapplied,—to unravel fraud, to investigate accounts; to enforce agreements, and the consequent examination of titles; to correct mistakes, to administer property involved in debts; and obtain these ends by means of discovery and the admissions of parties, must be the work of much time. Besides, a large portion of suits embrace the *administration of trusts*, and such suits beneficially endure as long as the trust continues. In case of the property of infants, it lasts till the age of twenty-one; the protection of property is necessarily continued until some person becomes absolute owner; and as the law permits property to be so limited, that it may become inalienable for any number of lives in being, and twenty one years more, it



may therefore happen, and often does happen, that in this sense, a Chancery suit will usefully endure for more than half a century.

The *Orders of the Court*, were collected by Lord Clarendon, in 1661. It is no matter of surprise, that many of them are not adapted to the increased wealth and commerce of the Country, and the Report proposes many alterations in practice, in the form of 188 distinct *Propositions*; which, though they may appear minute, yet it is upon the operation of a system of practice made up of minute regulations, that the delay and expence of a suit must depend.

The party ought to be compelled to take each step in a suit, in as short a time as he can be fully advised; the first process is *subpœna*, to compel *appearance*; which should be so framed as to inform the party what he is required to do. The defendant is compelled to *plead, answer, or demur*, and ought to have sufficient time for that purpose; orders obtained *of course*, for extension of time, may be dispensed with; but notwithstanding any positive rule, in many cases such extension must be given. If the defendant refuses to put in an answer, the plaintiff is enabled by process to proceed without it; the facts of his *bill* being *taken as confessed*. The present practice in regard to that process, is intended to be shortened and simplified.



The subpœna, is in every case to express the duty required and to be made returnable on a day certain ; a distinct writ to be sued out for each defendant ; so that in no case will it require personal service.

After appearance, the defendant will be allowed (and without the orders of course at present in use) eight weeks time to answer in a *Town cause*, that is, where he resides within twenty miles of London, and ten weeks in a *Country cause* ; but after eight days, he is liable to have an *injunction* against him to stay his proceedings at law, and after fifteen days, he will not be allowed to *demur* alone.

Under a Statute of *George the Second*, if a defendant being served with a subpœna does not appear, the course is, to issue an attachment to the Sheriff, and the defendant being taken, is brought by HABEAS CORPUS to the bar of the Court, and then the Court orders an appearance to be entered. It is proposed, that upon the defendant's default to enter an appearance for fourteen days after the attachment, the Court may order an *appearance to be entered*.

By the present practice, if the defendant does not answer within the time allowed, an attachment issues. If the defendant is taken, the course is, to bring him by a HABEAS to the bar of the Court, and he is committed to the

*Fleet.* If the defendant be not taken by the Sheriff, then there issues a long line of process, an *attachment with proclamation*, *commission of rebellion*, *Serjeant at arms*, and *commission of sequestration*; it is proposed to dispense with the proclamation, attachment, and commission of rebellion; and upon affidavit of belief that the party is to be found in the County, although not taken by the Sheriff, an order is to be made for the Serjeant at arms; the same being considered as preferable to an attachment notailable, upon which a defendant must be sent to goal. The defendant thus being either in the prison of the Sheriff, or in the custody of the Serjeant at arms, instead of the present practice of bringing him up by *habeas* and committing him to the Fleet, he is to be served in prison with an order, that the bill will be taken, *pro confesso*, unless he answer in three weeks. If the attachment be bailed by the Sheriff, and the defendant by subsequent process is committed to the Fleet, then a similar order will be made, after his twice being brought before the Court by *habeas*, at an interval of fifteen days.

The answer may be insufficient, or it may make it necessary for the plaintiff to amend his bill. The plaintiff *excepts* or objects to the answer, and he may vary his case, by amending



the bill, which requires a further answer. No decree could be made, under any course, in which the parties had not ample time to perfect their case in the pleadings. The alterations proposed are calculated to shorten the time in all these proceedings.

The answer being filed, the plaintiff may file *exceptions*, for which he has, at present, two terms, and the vacations; now, to be limited to two months, and to be referred to the Master in 14 days, or considered abandoned. The defendant is allowed 4 or 6 weeks to answer the exceptions. The plaintiff, if he objects to the *second* or *third answer*, must do so in a fortnight, pointing out the particular exceptions; and the defendant is allowed 3 or 5 weeks for the answer; or if the matter goes before the Master, he is to fix the time.

Upon a third answer being certified insufficient, the defendant is to be committed, and *examined upon interrogatories*. A plaintiff referring an answer for insufficiency, must obtain the Master's report within a fortnight, unless the *Master allows further time*. The Master is to decide on the relevancy and materiality of the questions, and his *decision upon exceptions* is to be *final*, unless he certifies that the matter is fit for the consideration of the Court.

The plaintiff is allowed by the existing

practice to *amend his bill* without limit of time, upon an order which he can obtain as *of course*. He may obtain that order even after the conclusion of his pleading, by filing replication, and after defendant has given notice of motion to dismiss the bill. It is proposed that the plaintiff shall be confined to *amend within six weeks* after the answer is complete.

The answers being complete, the plaintiff is not limited by the present practice to any time for *setting down the cause for hearing*. The plaintiff may go to a hearing on the bill and answer, or either party may go into evidence;—It is proposed that in the former case, the plaintiff shall set down the cause within one month after the answers are complete.

The time in which the defendant is entitled to a dismissal of the bill is materially shortened. By the present practice the plaintiff is not compelled to take any further step for three terms;—by the new rule, it is proposed that if the plaintiff do not proceed, a defendant may move at the first seal after the following term, upon notice, that the *bill be dismissed*, and the bill will be dismissed, unless further time be then given for obtaining answers of other parties, and at all events the plaintiff must then undertake to *speed his cause with effect*, failing



made returnable in fifteen days, and the defendant in contempt cannot be discharged without payment of full costs.

Notwithstanding these rules as to time, it is to be observed, that still *Solicitors may agree to dispense with such rules*, and it is reasonable to allow them so to do.

The cause being at issue, either party may examine witnesses. Allowing the imperfections in the present mode of taking evidence, the report does not approve of any plan suggested as a remedy. It is objected that the present mode deprives the judge of the benefit of an *oral examination*; but it is impracticable for the Equity judge to take such examinations in person. Such an examination would increase costs, multiply objections to evidence, and require a judge of sufficient weight to controul them; even then the examinations would not be taken before the Equity judge; and in cases of much doubt, resort is had to *issues* before a jury.

If the increase of delay and expense would lead to any material saving of either, in the ultimate decision, the experiment might be tried; but the Commissioners are satisfied the instances are rare in which suspicion of injustice can attach, in consequence of the existing mode. The number of cases depend-

ing on testimony is small. It is one advantage of the present practice, that it records the evidence.

The report proposes some regulations for examination of witnesses by Examiners in London.

A *subpœna* is to be served upon every witness,—no *subpœna* being at present used. The production of the witnesses to be identified at the seat of the clerk in court, is to be dispensed with; the Examiner is authorised to administer the oath instead of the Master; at present one of the two *Examiners* examines, the other cross-examines; in future the same examiner will go through the whole; the examinations are to be taken down in the *first* person; and the *common interrogatory* at the end, whether the witness knows any thing to the *benefit of his party*, is to be exchanged for the words “*material to the subject.*”

In regard to Commissioners for examination of witnesses in the Country.—At present such commissions are directed to 2, 3, or 4 Solicitors, named by the parties; in future they are to be directed to a certain number of persons to be named by the Lord Chancellor, being Barristers, empowered to act above twenty miles from London, and within such greater distance as the Chancellor shall think fit; and the Chancellor may nominate other persons



resident in the Country, Barristers where they can conveniently be found, and one of such persons alone is to execute the commission. The Master in attendance at the public office, is to appoint the place of execution, and to name the Commissioner, who is to receive five guineas a day, and no tavern expences to be allowed. Authority is to be given to the *Masters to investigate facts by oral examination* of parties and witnesses.

In a *suit for establishing a Will*, the heir at law is entitled to an issue *devisavit vel non*; but he is not compelled to decide thereon until the hearing, when he will have had an opportunity of considering the evidence; this creates a repetition of evidence, besides that the first evidence may improperly affect the subsequent testimony:—It is proposed that in such cases neither party before hearing shall enter into any evidence, except examining and cross examining the subscribing witnesses to the will.

The evidence being taken, the *examinations* are *concluded*, and the depositions made public. Too much latitude has been given to procrastination, by allowing the period of *publication* to be extended. It is in future to be allowed only on special grounds. Publication being passed, the plaintiff is to *set down* his cause for *hearing* in a short limited time, or defendant may without notice have the suit dismissed.



The *Delay*, between the setting down and the hearing, will be lessened, by the general acceleration of business, occasioned by making the decisions of the Masters on some points final; by the regulations subsequently suggested in regard to *Appeals*, and for the withdrawing part of the business in *Bankruptcy*; and by the limiting the number of *Counsel to be heard* in each case.

By the *Cause papers* it will appear that the time of the Lord Chancellor has been generally occupied, not in hearing causes, but by the *incessant intervention of special business*, on the plea of immediate urgency.

The cause being heard and decided, an important duty devolves upon the *Registrar*, of taking the *Minutes*, and drawing the *Decree*. This involves much delay in getting the Minutes settled, and expence in getting the Decree issued. A judgment in Equity embraces various points, and the old practice of the Registrar taking, and reading the minutes, in presence of the judge and counsel, cannot under the pressure of business be revived. The regulation of this matter must be left to the discretion of the judges, only, the suitor must be entitled to have his decree prepared with reasonable dispatch. The report recommends two additional Registrars, and measures

for securing a constant supply of persons duly qualified,—the permitting a registrar to retire, upon length of service, and the appointment in future of Barristers of experience to the situation.

In reference to an inconvenient practice of applying to the Court to *vary the minutes*, the report proposes to limit the time for such applications. With regard to the form of drawing up the decree, the report recommends a strict adherence to Lord Hardwicke's order, that “the recitals shall be confined to the substance of the pleadings tending to the points in controversy, to be made in the most concise manner;” the party taking the decree must be furnished with a copy of the whole decree, but other parties may take a copy of part only.

After the hearing, the duty of the *Master in Chancery* usually begins, though references are frequently made at an earlier stage. Few cases are brought to a final decision without inquiries before the master. The time there consumed is a prominent subject of complaint, and not unfounded, although unjustly directed against the practice in the Masters' offices. It has been considered how far it is possible to give the Master a more efficient controul of the proceedings in a cause referred to him;—At present, the Master proceeds only on the



application of the party, the Master having no power to direct or expedite ; the Commissioners are satisfied that a large portion of the evil of expence and delay may be removed, by giving the Masters the *active superintendance* over the proceedings.

There are some cases where parties may be left to conduct their suits according to their discretion ; and when all parties being competent, concur, it need not be incumbent on the Master to urge them ; but inquiries are often directed involving interests of persons, not parties to the suit, and either imperfectly or not at all represented. In such cases an *ex-parte* proceeding is inapplicable ; the object is to have the directions executed, and the Master should *direct and expedite the execution of the decree*. For that purpose the Master is to keep an *abstract* of the proceedings in every cause, open to the Court, furnishing authoritative evidence of activity or negligence.

Upon the decree or order being brought into the Master's office, according to the new propositions, the master will *fix a time* for considering the matter ; appoint the parties to attend him, and direct the future proceedings ; much time being frequently lost for want of taking a comprehensive view of the whole decree at an early period ; and the master will



continue to fix stated times for proceedings as the nature of the case requires.

Further, in cases when justice admits, the Master is to proceed *ex-parte* ; that is, upon default of a party to do what he ought at the prescribed time, the report is to be made in favor of the other party,—the Master may for want of due diligence in the party prosecuting the order, *commit the prosecution* to any other party,—and in every report the Master is to certify whether the inquiry has been prosecuted with reasonable diligence. The Master is to be at liberty to proceed in all matters *de die in diem* at his discretion. Every appointment, or warrant for attendance is to be considered as peremptory. Where, by order of Court, *books or papers* are to be produced before the Master, the Master may determine what papers shall be produced, and how long left ; or he may give directions for inspection merely. All *accounts* are to be brought in, in the form of *Debtor and Creditor* and any party may examine the accounting party upon interrogatories. The Master is to be at liberty to refer accounts, with the consent of parties interested, to *an accountant* ; and in case of an infant, lunatic, or married woman, the Master will decide whether such reference be for the benefit of such party ; and if so, may refer the same accord-

ingly.—There is to be *no exception* to a Masters report, upon matters of account in respect of any sum not amounting to £50, unless with the Masters approbation.

In case of *Receivers*, in place of annual periods for delivery of his accounts, the Master may fix longer or shorter periods; and the Receiver shall be authorised to make any proposal to the Master for *management of the Estate*, without presenting a petition to the Court upon every occasion; and the Masters report thereon to be confirmed by the Court. The Master is not to receive further evidence after issuing his warrant for *preparing his report*; which he is to do without previous notice to the parties.

The Master is to have power at his discretion to examine any witness *viva voce*, the evidence to be taken down before the Master, and preserved. The Master may make separate reports as he sees expedient. The master may examine any creditor or claimant either upon interrogatories or *viva voce*.

No reference is to be made to the Master for scandal or impertinence, unless the *exceptions* are put *in writing* and signed by Counsel. The Master in deciding on the sufficiency of any answer or examination is to take into consideration the relevancy or *materiality of the*

*question.* The *Masters report* upon all references for scandal or impertinence, or for the insufficiency of answers or examinations, shall be *final*, unless the Master shall certify that it is a fit case for appealing to the Court.

Upon the question, whether the Master should be paid by *fees* or *salary*, the Commissioners think, that the fees ought *not* to be discontinued; and that if the Masters are to receive salaries in lieu of fees, the fund should continue to be provided, in part at least, by fees; but they strongly recommend that the Masters should no longer have any interest in the receipt of monies paid for *copies of proceedings*; and that the fees for such copies be reduced to the *ordinary charge*; and a party be no longer required to take a copy, unless necessary for the due proceeding. These changes will so materially affect the fees, that it will require some time to ascertain what may be the average amount of fees receivable by the Master in future. The Commissioners recommend that the fees shall be quarterly accounted for; and that the Masters shall receive by way of salary, sufficient to make up their present average emoluments, and ultimately receive a fixed salary to that amount. The Commissioners also recommend that payments by way of



*gratuities* to the Masters' Clerks be no longer allowed.

The Report refers to the great increase of business in the office of *Accountant General*, and it appears by a return in the appendix, that the number of accounts have increased within a century, from 700 to 8460; and the amount of money invested, from three quarters of a million to *upwards of thirty nine millions*; that it has doubled in amount of money in the last 25 years. The report suggests an important alteration, that in future the Accountant General shall *re-invest all dividends*, without any application by the party for that purpose.

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### *Chancery Report.*

#### *The second Part.—As to Pleadings and other matters.*

THE Report having been so far limited to the *practice* of the Court, proceeds to consider several *particulars, not strictly within that description*. The *forms of Pleadings* are, by the orders of the Court, to be *short and succinct*, but in practice they are open to the charge of

unnecessary prolixity. In cases of mere administration, where the point in dispute is a question upon the simple construction of some instrument, the same forms of pleading cannot be requisite as in those of complex litigation. The Report proposes that in case of payment of a *legacy* being resisted, wholly from doubt as to the *construction of a Will*, the legatee or executor upon *petition* may obtain judgment, without resorting to the usual proceeding by bill and answer. It has been suggested that it might be expedient in other cases where the plaintiff seeks no discovery, to enable him to proceed in like manner, by petition; taking care that the defendant should have due notice, so as to enable him to make his defence in whatever mode his case should require;—the Commissioners *reject this suggestion*, under an apprehension that it might lead to greater embarrassments.

The Commissioners are of opinion, that terms of recommendation only, can be applied to the prevention of *unnecessary prolixity*; the forms of pleadings not being prescribed by any positive regulations.

It is one advantage of the system of Equitable jurisdiction, that by embracing the *interests of all parties* who can possibly be affected by the decision, it does complete justice; and prevents

all future litigation respecting the same rights. In some cases however, from the great number of persons interested, certain persons have been permitted to represent all other persons having a like interest. This cannot be by any positive regulation, but must in each case be at the discretion of the Court. As to *Supplemental Bills*, which are necessary to enable a person acquiring an interest after the commencement of the suit, to become a party to the proceedings, the Master is, in order to prevent vexatious delay, to limit the time for answering.

It appears upon the evidence, that a general persuasion exists, that where in consequence of some *doubt on the construction* of a deed or will, an executor or trustee finds it necessary to place himself under the direction of the Court, it is the course of the Court to *assume the management and execution of the whole trust*; thereby entailing much unnecessary delay and expence. The Commissioners observe that in most of these cases, either the parties wish for the superintendence of the Court, or it is necessary for the indemnity of the party. If the parties interested are minors, no rule could secure the trustee against the possibility of having his conduct impugned, when these parties attain their majority; and though due caution may protect him from ultimate injury, yet *the chance*



*of being involved in a suit, is sufficient to induce most men to shrink from the responsibility of acting in any complicated or extensive trust, without the sanction or indemnity of the Court.* This indemnity ought to be afforded with the least possible expence or delay; and the Commissioners trust that the general alterations recommended will do much good in this respect. By the present practice, if the parties interested are under no legal disability, no more time need be occupied, than in the proper administration of the same property, without the intervention of the Court. They are aware that the rules of practice, being applicable to all suits, permit parties desirous of delay or careless, to protract a suit, to the great injury of other persons interested. The new rules, particularly in the Masters' offices, are intended to correct this evil. In fact, much unnecessary expence is incurred, in cases of small property; they hope by abridging the delay, the expence may be materially lessened.

An *Executor* or *Trustee* may find some point of difficulty upon which he may wish the judgment of the Court, but be desirous in all other respects to execute the trust, and the parties may wish him to do so. In such a case, a doubt having been expressed whether it be in the discretion of the Court, on a bill filed by the

trustee or other party interested, to *confine the decree to the relief prayed*, without assuming the general execution of the trust; the report declares that such discretion does reside in the Court.

A defendant in Equity ought to be enabled to submit to the Court any matter of fact by reason of which he apprehends he is not compellable to make the disclosure sought. By the present rules, the defendant may *demur* to the discovery, upon any ground of objection apparent on the bill; and by *plea*, he may allege any fact not stated in the bill which operates as a bar to such discovery. He may also either demur or plead as to part, and *answer* as to the remaining part. But in so doing, if he answer any part which by his plea or demurrer he insists he ought not to answer, he deprives himself of the benefit of his plea or demurrer. This frequently embarrasses the justice of the case, and the Report proposes, that *a defence by answer shall be permitted, in all cases where a plea or demurrer would be applicable*, providing, that on the plaintiff's objecting to the validity of such part of the defence, the matter shall be expeditiously decided by the Court, and not as in other cases by the Master. The Report rejects a suggestion requiring the plaintiff in every case to make oath of the truth



of his bill. In *injunction* suits, the plaintiff may derive direct advantage, by the introduction of mere fiction, thereby rendering it impracticable for the defendant to give a complete answer within the short time limited, and thus gain an injunction to stay proceedings, at law ; but such allegations may be essential to the discovery of truth ; the Report therefore does not recommend the requiring from the plaintiff any affidavit of the truth of the bill, but that the plaintiff and his Solicitor should both make *affidavit that the bill was not filed for delay.*

In suits for *administration of Assets*, delay is often the object of the executor, in order to protect himself from legal suits. To provide against this evil, it is proposed that the *same Solicitor* shall not be concerned for plaintiff and defendant, in a *Creditor's suit*, nor in any case in proceedings in the Master's office, where the Master thinks a separate Solicitor is required. That an *Executor shall annex to his bill or answer a full account of the property*, verified by his affidavit. That at any time after the filing such bill or answer, the Court may make an order for securing the balance and outstanding property, upon the summary application of any party, creditor, or person interested ;—a person not being a party, being entitled for this purpose



to read and have a copy of any part of the bill or answer. That if *after* the commencement of such a *suit*, the executor shall make a *payment to any creditor*, to the prejudice of any other creditor of equal degree, the same shall be so far disallowed. The executor may at any time apply to the Court for an *injunction to restrain proceedings at law*, making an affidavit of the balance in his hands, and submitting to the payment of such balance into Court, and to a decree for an account; but if he omit to do so, and suffer a creditor to recover at law, he shall not be allowed the debt and costs so paid beyond the proportion which other creditors ultimately receive. In all cases it shall be in the discretion of the Court to allow *interest to creditors* from the date of the report.

The Commissioners express a belief that these provisions will be effectual in preventing delay and expence in an administrative suit; and on the same principle, that they proposed to entrust an active superintendence over a cause, to the Master, they think it right to extend the means by which parties having an interest, though not on the record, may controul and expedite the progress of a suit. Much, after all, must depend on the *activity of agents*, and the *vigilance of parties*; and extraordinary as it may seem, persons having a deep interest,

and feeling the inconvenience, often content themselves with general complaints, without appealing to the Court, or taking pains to enquire if a reasonable exertion would not obtain a remedy. With this view it is proposed that any person, whether party or not, may obtain at the Six Clerks' office, a *certificate of the dates of the several proceedings*, for a trifling fee.

In *account causes*, it is proposed that if the plaintiff desert the suit, the defendant may, by motion or petition, claim a decree, and proceed therein as if the usual decree had been made at the hearing.

And in all causes, wherever, after answer, it is apparent upon the pleadings that some certain decree must be made, the Court may make an order to the effect of the decree, upon the summary application of any party, or person interested;—and also in all causes after answer by order upon motion, by any party, to direct inquiry as to any matter or accounts; in order that the Master's report thereon may be ready at the hearing.

No more than two Counsel are to be heard for each party in a cause, and both may be selected from the outer Bar; and the practice of the King's Bench and Exchequer, allowing Counsel to move in succession, each being limited to one or two motions, is recommended

in preference to the practice in Chancery permitting every barrister when called to go through the whole of his motions. The Report notices the inconvenience in regard to the *attendance of Counsel*, by reason of the simultaneous sitting of two Judges of the same Court, but no remedy is proposed. But in case of a *Solicitor not attending*, he is to be charged with costs.

With regard to the *clerks in Court*, the Report recommends the continuance of these officers, attending to secure regularity of practice, abolishing however their usual fees for attendance in Court which never takes place. It is proposed to relieve the Masters from the duty of *taxing costs*, and to transfer that duty to the *Six Clerks*, who are to be relieved from the reading of documents in Court.

With regard to *Costs*, an important rule is proposed,—that *all costs* shall be *taxed*, upon the principle upon which costs are at present regulated *as between Solicitor and Client*, unless as to such costs as shall appear to have been unnecessarily incurred. In case of exceptions, besides increasing the deposit to ten pounds, the party failing in his exceptions shall immediately pay full costs; and on an appeal or re-hearing, the deposit shall be £20, besides the party failing therein being liable to full costs.



Difficulties having been experienced, amounting to a failure of justice, from the contumacy of a party *refusing to obey an order*, directing him to execute some instrument, it is proposed that the Court shall be authorised to order a Master to execute such Instrument in the name of such party.—And where a party obstinately retains possession of lands after service of a writ of execution, a writ may issue for giving possession, without the intermediate injunction for that purpose now used.

Counsel are to be prohibited from preparing a bill without *written instructions* from the Solicitor, a rule intended to prevent the preparing a bill upon an invented case. Parties in a cause are considered as represented by their clerks in Court, service upon whom is to be considered as good notice. It is proposed that where a person, who is not a party, appears upon any proceeding, service upon his Solicitor in London shall be sufficient.

Out of Term, motions can only be made on occasional days, called Seal days.—It is proposed that an order *Nisi* to confirm a report or dissolve an injunction, may be obtained upon petition at the Roll's Court as well as on motion.

By the present practice, the defendant is not entitled at the hearing to *read any part of the answer* unless where the cause is heard upon

bill and answer, or upon questions of costs and other excepted cases; but if the plaintiff read as evidence any part of the answer, then the defendant can read only such parts as are grammatically connected with it. It is proposed that the defendant shall be at liberty in such case to read *any part of the answer which explains or qualifies the passage read by the plaintiff*; the defendant however not having the benefit of any such fact as evidence, if capable of proof, without proving the same; the Court being always at liberty to refer to the whole answer.

The Report concludes this part of the inquiry with a most important observation. “Before  
“we close this part of the Report, we trust that  
“we may be permitted to observe upon one  
“other point immediately connected with the  
“subject of it. No person can have had much  
“experience in Courts of Equity without feeling  
“that many suits owe their origin to, and many  
“others are greatly protracted by, questions  
“arising from the *niceties and subtleties of the*  
“*law and practice of Conveyancing*. Any alter-  
“ation in this system must be made with the  
“greatest caution; but as connected with the  
“object of saving time and expence to suitors,  
“in the Court of Chancery, we venture to sub-  
“mit to your Majesty’s consideration, whether it

" might not be proper in a Court so competent  
 " generally, for task of examining the part of our  
 " Law; with a view to determine if any improve-  
 " ment may be made in it, which might  
 " lessen the expense, and narrow the field of lit-  
 " gation respecting the transfer of property."

### *Chancery Report.*

#### *The third Part.—As to the Jurisdiction of the Court.*

THE last branch of the inquiry is "whether  
 " any and what part of the business now  
 " subject to the jurisdiction of the Court of  
 " Chancery, can be usefully and beneficially  
 " withdrawn, and committed to the jurisdiction  
 " of any other Court."

In regard to *Commissions for examination of  
 witnesses abroad*, which at present, except in  
 cases provided for by special Act of Parliament,  
 can only be granted by a Court of Law, with  
 consent of both parties; failing which consent,  
 resort must be had to Equity; it is proposed  
 to invest Courts of Law with power to issue  
 such Commissions.

In cases of writs of *habeas corpus*, granted by



the Chancellor, it is proposed that he should be enabled to transfer the case, by making the writ returnable before another judge. The jurisdiction arising under local or private Acts of Parliament is proposed to be transferred to the Exchequer, as well as the jurisdiction under the Acts for Benefit Societies.

Upon the expediency of *transferring the jurisdiction of Bankruptcy from the Lord Chancellor to some other tribunal*, the Commissioners are of opinion, that as the business of Bankruptcy involves the consideration of the most important points, the final jurisdiction, not being subject to appeal, cannot with public satisfaction be transferred from the Lord Chancellor to any other tribunal. The business would not be sufficient for any judge or Court ; a judge so confined would be less familiar with the general doctrines of Equity, and the unnecessary multiplication of Courts of separate jurisdiction is in itself an evil. Their conclusion is, that it would *not* be beneficial that the jurisdiction in Bankruptcy should be withdrawn from the Lord Chancellor, unless it eventually appear that it cannot be retained consistently with the due dispatch of the other business of the Court.

With regard to the administration of the *jurisdiction in Bankruptcy by the Commis-*

*now,*—Bankruptcy matters are at present heard before the Lord Chancellor and Vice Chancellor by petition, the greatest number being Appeals from the decision of Commissioners; and parties not being confined to the same evidence as was adduced before the Commissioners, the hearing becomes in practice like an original hearing. All facts are substantiated by affidavits, frequently of great length, and of a conflicting nature; the evidence to be collected from affidavits, is in its nature unsatisfactory, as no person can be compelled to make an affidavit, or to state more than he thinks fit to disclose; and it often happens that after laborious investigation, the Court can come to no safe conclusion without an Issue.

The Report proposes that the Lord Chancellor shall select *Ten of the Commissioners of Bankrupts*, to sit as a *Court of Appeal*, from the Commissioners on the London Commissions; to proceed by *viva voce* examination of witnesses, wherever practicable; to be taken down by a proper officer, question and answer; and returned to the Chancellor, who will act thereon, without permitting any party to make a new case; the Chancellor however having the power of remitting the case for any further examination. Three Commissioners to form a Court, sitting in rotation as often as required, whereby

the public would be better served at a small expence, than by a permanent Court of judges, not having any other employment, or the benefit of continued intercourse with other Courts ; all appeals from the London commissions to be in future heard before the Commissioners of appeal, who shall simply affirm or disaffirm the decision ; and shall have power to award a liquidated sum for costs ; and from whose decision, in all matters amounting to £50, an appeal is to be made to the *Lord Chancellor*, except only in the question of costs. The proposition is at present confined to London commissions ; if the experiment succeeds, the principle may be extended throughout the kingdom. The Commissioners are to be paid the same fees as they are at present entitled to, at any public meeting under a commission.

The office of *Vice Chancellor* was established by an Act in 1813, whereby he was empowered to hear such matters only as the Lord Chancellor should direct. It is proposed to repeal this provision, and that from henceforth the same independent jurisdiction should be exercised by the Vice Chancellor, as by the Master of the Rolls ; the Vice Chancellor having in addition, jurisdiction in Bankruptcy. It is intended to prevent *motions* before the Chancellor in the nature of appeal, after a motion on the same



subject before the Vice Chancellor; or at the Rolls, except upon certificate of Counsel of the propriety of such appeal, and upon the same evidence.

By former orders of the Court, *the time for an appeal* from the Rolls to the Chancellor, is limited to one month after the decree pronounced; but that rule has not been acted upon. It is proposed to extend the time, but to limit the period for any appeal from the Vice Chancellor or Master of the Rolls, to six months. *Re-hearings* before the same judge are proposed to be limited to one year, on the ground that matter requiring a re-hearing often comes out at a late period upon inquiries before the Master.

One mode of relieving the Judges in Chancery from the pressure of business, is the restricting in some reasonable way the right of *successive appeal*. It has already been proposed that upon the inadmissibility of any part of a bill, or insufficiency of an answer, the *decision of the Master shall be final*, unless upon the Master's certificate that the matter is fit for an appeal to the Court. Courts of Law do not permit their judgment on interlocutory matters to be disputed on appeal. It is proposed that on other matters, *from the Master* there shall be *one appeal* to the Vice Chan-

cellor, or Master of the Rolls;—that in cases originally heard before either of those judges, there shall be *one Appeal*, at the option of the party, either to the *Lord Chancellor*, or to the *House of Lords*;—authorising the Chancellor on his own suggestion to direct a re-hearing, or appeal to the Lords. But if the decree be, on appeal to the Lord Chancellor, reversed, then the *other party* will not be precluded from appealing from that judgment to the Lords. From the Lord Chancellor, in all cases not coming before him by way of appeal, there will remain, as at present, the appeal to the Lords.

Another proposition provides, that all *appeals* to the Chancellor from the Vice Chancellor, or Rolls, shall be *heard on the same evidence* as was used in those Courts; for which purpose the decree must distinguish the evidence used.

Further propositions declare, that when a party thinks fit to *re-hear* any matter before the same judge, *such party* shall not be at liberty to appeal from the judgment on re-hearing; that all applications to *stay proceedings* upon an order appealed from, shall be to the judge who pronounces the decree, and his decision be final. That all applications for a *new trial* upon an issue, shall be to the judge who

directs the issue, and that upon all questions arising on *demurrers to evidence*, being considered as mere interlocutory matter, the decision of the judge shall be final, and no appeal allowed.

Having thus laid before the reader, with as much of explanation as the space would allow, the substance of the whole Report, we are the better prepared to enter on the more immediate subjects of the present inquiry; in the course of which it will be my object to incorporate with such observations as I shall have to make, the *Evidence* attached to the Report; well aware of the additional weight given to the matter by the names to which I shall have occasion to refer, and of the sound and practical information that Evidence contains.



## CHAPTER V.

### *Equity Practice.*

#### *Preliminary Observations.*

THE bulk of the evidence annexed to the Chancery Report, founded as it is on the deliberate opinion of some of the most eminent men at the English bar, is of a nature so important, that it well deserves more laborious attention than on the present occasion can be dedicated to it. Upon all the points to which the Report itself is directed, we may safely assume that the Report has embodied all that is valuable in the evidence, at least so far as the Commissioners have deemed it safe to reduce the improvements suggested to practice. But there are various points of the highest importance in the present inquiry, and leading to effects the most extensively beneficial; either not adverted to by the Commissioners, as being beyond the scope of their inquiry, or upon which

the measures they have recommended do not appear to go to the whole extent of that reform which is necessary.

I know not that the observations I have to make on these points, can be better introduced than in connection with this evidence; and I am sure that where I can in a compressed form, catch the spirit of the opinions to which I shall have occasion to allude, I shall be doing better service to the public by submitting to its judgment those opinions, than by any mere speculations of my own: and upon the same principle, I shall, in this examination, avail myself of the *Considerations* suggested by the Report, lately published, and generally attributed to a noble Lord, one of the Commissioners, but whose name does not appear attached to the Report; and I shall endeavour to introduce such matter of observation as may appear material, in connection with the several points discussed in the evidence.

The objects of the Parliamentary Inquiry are, "whether any alterations can be made in Equity practice, whereby expence and delay may be saved; and whether any part of the business can be usefully transferred to any other tribunal."

The former branch includes, not only alterations of mere practice, but any reform in the

pleadings, or general plan of proceeding, which may tend either to avoid expence, to accelerate the decision of a cause, or in any way to make the proceedings more convenient and beneficial to the public. The latter head may fairly be understood to comprehend, not only the question of detaching any part of the business from the Court of Chancery, and the placing it under any other Equitable Jurisdiction, but also the necessity or propriety of making any alteration in the Law itself, which may have the effect of simplifying questions, restraining litigation transferring any part of the jurisdiction to a Court of Common Law, or relieving the Court altogether from matters with which it may be inconveniently occupied.

With regard to the time employed in suits in Equity, there will be no hesitation in concurring with the sentiment expressed in the Report; that the length of time consumed in the suit is not of itself any proof of procrastination or injustice. Delays are not to be imputed to Equity proceedings, as compared with proceedings at Common Law, in proportion to the greater length of time consumed in the former. At Common Law the only object is to bring the parties to issue upon a matter of law or fact; to reduce the merits to some one or more points which may be submitted to a trial by a



*Mystery* which envelopes the present system of proceedings, and the displaying the machinery in a view so plain and simple, that it may be easily worked by that class of society, to whose hands it must necessarily be assigned.

The Author of the *Considerations* points out some inconsistencies in the effect of several of the propositions, observing that they shew the difficulty of framing such strict rules to guide the practice of a Court, in which the proceedings are in their nature so various and dependent on circumstances; and concludes, that “the Solicitors are so much in the habit and so much under the necessity of mutual indulgence, in practice they will be little attended to, except for the purpose of vexation;” expressing his apprehension that rules so precise will multiply special applications, and subtract the time of the Court from more important business.

I freely confess that the specific periods limited for amending the bill, and for putting in the answers, do appear to be too straitly confined. In matters more commonly the subject of Equity suits, ample time ought to be afforded to parties in the Country, (and there are few suits where the subject is not in some degree connected with inquiries in the Country) to collect the information necessary to enable

them to be advised by Counsel in London, and to adopt deliberately that course, which in the end will best ensure the saving of expence and the preventing disappointment. It is much more by the laying open of the nature and purport of the proceedings to public understanding, that one may in general anticipate increased dispatch in the conduct of a cause, than by any positive limitations of time. The machinery must go upon right principles, and have within itself a self-correcting power; and considering the great variety of circumstances in which Equity suits are involved, there may be reason to fear that any strict limit, having merely dispatch in view, beyond the proper spur to useful activity, may be found to impede rather than to facilitate that machinery we are endeavouring to improve.

The public want to have it plainly laid down, at what periods the principal parts of the cause, the *Acts* as it were, are to commence and conclude, but it is impossible to lay down before hand the minute regulations for managing the *scenes*. All that can be required is, that the rules be such as to enable active agents to go straight forward to the end they aim at, to lay open negligence and inactivity, and to convince the public that there is a superintending controul in the Court, ready to be exercised at



all times, and whose aid may be promptly attained—not for the purpose only of ultimately deciding upon the merits, but for the purpose of directing the several incidental points necessary for the decision.

Practically then, the maxims upon which any reform in Equity practice can alone be effectual, are these,—that the state do provide an effective tribunal; that the Court, assuming an entire jurisdiction over property, ought to work in the manner best adapted to keep property beneficial; that where pleadings admit of delay, that delay be not a hindrance to justice; that so far as the judgment depends on facts, those facts be presented clearly before the judge; and that all the operations of the Court in the carrying its judgment into effect, be conducted in a way the most direct and satisfactory. In all these points, the present practice of Equity is admitted to be defective; the judicial establishment does not keep down the business; the pleadings are too prolix and dilatory; property is too much locked up; its beneficial enjoyment is too long suspended; facts are not presented to the Court in the best manner, and the powers of the Court are not exercised in a manner most beneficial to the community. The *Propositions* do not go far enough, to remedy these inconveniences.



## CHAPTER VI.

### *Equity Practice.*

#### *The Solicitors and Clerks in Court.*

THE Noble Author of the Considerations, in pointing out the necessity of giving the plaintiff ample opportunity of amending his bill, adverts with disapprobation to a proposition, prohibiting the amending a second time without an affidavit by the plaintiff *and his solicitor*, that the matter is advised by counsel and is material to the case, and not intended for the purpose of delay.

Indeed I cannot but consider that this proposition, and any regulation requiring a plaintiff to make oath as to the truth or merits of his case, whether original or amended, for the purpose of entitling himself to appeal to the justice of the Court, is in principle highly objectionable; and the requiring his Solicitor to join in the oath is much more so. *That* goes directly to the destroying of the character univer-

sally understood to subsist between a client and his legal adviser. However, in a moral point of view, people may differ as to the propriety of advocating an unjust cause; the universal habits of mankind have admitted it, and if it be necessary that appeals to justice should be made to constituted tribunals and not to individual opinion,—if Law be a science, and legal attainments be necessary to understand and administer it,—so long it appears to be clear that parties must have legal assistance, without the solicitor or the advocate being entitled to assume the office of judge, and act upon their own ideas of the merits. The privilege of amending the bill is most salutary and necessary; it ought to be unlimited, except by the time of concluding the pleadings;—if the amendments really be unnecessary and vexatious, the judge has the costs in his discretion at the hearing, and may and ought to apply them in this and every other case to the restraining of vexatious proceedings; and upon what ground it could have been contemplated, to require the *Solicitor* to swear to the materiality of the plaintiff's case, I really am at a loss to conceive.

The author of the *Considerations*, indeed, appears almost to consider that any further limitation of time is unnecessary and inconve-

nient ; at least such is the general tenor of his observations. My idea is, that the further limitation of time within which an appearance can be compelled, and a decree obtained, against a refractory defendant, is all so much gain ; that the abolishing of the *Orders of course* for time, is an excellent improvement, but that the time limited for answering, for amending the bill, and for exceptions to answers, may be too confined. In particular, the time limited for putting in an answer to an amended bill, ten days, is most unreasonably short.

The author of the *Considerations* concludes, that “ unless some important change can be  
 “ made in the mode in which business is now  
 “ conducted, no material relief can be afforded  
 “ to the suitors, either as to expence or delay ;  
 “ because the great cause of expence and delay  
 “ is the mode in which business is conducted,  
 “ not only in suits in Chancery, but in all mat-  
 “ ters under the management of *Solicitors*.”  
 Now I am afraid that if this is the only relief, or at least if this is to be the first part of the reform that is to take place, public hope would sicken before that relief and reform could be obtained. It is the duty of the Legislature to make the tribunal fitting for the dispatch of the business of the country ; and judges will not then be wanting to put it into efficient



operation, or solicitors and agents of all descriptions honestly inclined to put their clients in the situation of obtaining the benefit of accelerated justice, and able to advise them the most direct way to that object. Simply, it is the Reform of the Court that must controul the conduct of the agents, and not the conduct of the agents, the proceedings of the Court. Let the state of the Law, and the character of judicial proceedings, be made as simple and direct as the nature of the case will permit, and then its own simplicity will be the best security against that idleness, ignorance, or knavery, of which the Commissioners as well as others, complain.

The noble author of the Considerations dwells with mingled satisfaction and regret, on the loss of the efficient assistance of the *Clerks in the Chancery*. There is at present an office near the Chancery Court, called the office of the Six Clerks, in which all the records are kept, all the proceedings filed, and through whom all notices and acts in the cause must still proceed; each of the six clerks had his twelve clerks sitting in a public office, through whom all business was transacted;—and it is said, that it was not till the year 1729, when a law was passed, authorising the admission of all attorneys as Solicitors in Equity,

that the business got into the hands of the class of solicitors at large in the country. The natural consequence has been, that the whole business comes in effect to be conducted by the solicitors; the number of clerks has, from want of business, dwindled from seventy-two to eighteen; and the noble author considers it as matter of regret, that "the solicitors, not "being Clerks of the Chancery, have become "the immediate managers of the important "parts of the business of the Court, and hence "the difficulties which have occupied the attention of the Commissioners have begun and "have ever since rapidly increased." The noble author then goes into a detailed statement of the manner in which business is conducted in the office of a solicitor of great business; he complains that business is done by delegation, and in some degree attributes the great prolixity, which we all admit to have been introduced into Chancery pleadings, and modern conveyances, and legal proceedings of all sorts, not excepting the acts of the legislature itself, to this new system, of the business being conducted by solicitors instead of the Chancery Clerks. No rules, he says, can prevent one solicitor granting to another that indulgence of which he must be conscious he may himself have need; and therefore concludes, as



I apprehend the argument, that none of the regulations of the Commissioners go to the root of the evil, and that it lies too deep to be so removed.

I freely admit that the regulations proposed by the Commissioners do not in my apprehension, in many respects, go to the root of the evil ; but then I am taught to believe, that the root lies in a very different direction from that which the noble Author apprehends. Surely it is not seriously intended to be argued, that the subversion of the character and profession of a solicitor, and the sending every party in the country, to go and tell his case to a sixty clerk in the public office, is the way to remedy those national evils of which we fairly and justly complain. Is it meant, instead of accelerating justice and conforming the practice of Courts to the wants of mankind, to go back to antiquated forms and manners, long ago put aside as useless and forgotten ? If not, it cannot be beneficial to divert the attention of the public from a laborious inquiry after the evil and its remedy, to the conduct of the agents they may chuse to employ ; and to tell them that unless they employ others, they have no pretence for asking for the remedy they seek ; or, which is much the same thing, that no remedy can put them in possession of the relief they ask. If an



author whose opinion is entitled to so much weight, has thus mistaken the main origin of the evil, and treated that as the cause, which in reality is only one of the effects, of an inconvenient system, it was necessary to present the point to the reader's attentive consideration.

The public may be well assured, that to none is the procrastination of Equity proceedings more sincerely irksome than to the *Solicitor*. In a suit at law, there are stated periods, at which the particular stages of the suit must take place, and one particular stage in which all its merits must come into public view; no material proceeding can be postponed but by consent; and without any inconvenient hurry, there is so much that goes to incite and ensure the active attention of the attorney, that in *legal* proceedings, we are not accustomed to hear delay, as a general fault, attributed in that quarter. There is no sound reason therefore, upon which we can assume a general spirit of procrastination in the same men acting as Solicitors in Equity, which is not evinced in their practice in the character of Attorneys; but the whole tenor of equitable proceedings is exactly calculated to paralyse all activity, and destroy all interest in the solicitor. The connection between the party and the Court

exists only through the solicitors, and every reform in the proceedings ought to have for its object, the fostering that connection, the placing the solicitor in a responsible situation, and laying open his conduct to public animadversion. If it be desirable so to administer justice, as to bring home to each man's door, not perhaps the actual machinery by which she works, but so much as may make familiar and satisfactory the mode in which she proceeds to her object,—then it is of much importance that the forms of the Court should be so much within the reach of the general practitioner, and so plain and intelligible to the suitor, as to extinguish all suspicion of the even-handed balance by which her decrees are administered. The great object is, to make it the *interest* of the agent to conduct the suit to a speedy termination, and if the means were afforded in general of obtaining a speedy decision, dispatch would be the direct interest of every man, hoping for general patronage.

Intimately connected with the subject of the solicitor's conduct, is the consideration of the expediency of continuing the system of *Clerks in Court*, I cannot persuade myself but that if the Commissioners had looked steadily at the paramount importance of utterly excluding any and every source of unnecessary delay and

expence, they would not have arrived at the conclusion, that "no case of inconvenience had been proved," that "no material delay, and a very trifling expence arise from their intervention," and that "the existence of these officers tends to secure that regularity and uniformity of practice, which could not otherwise be obtained."

All pleadings are filed in the office of the Six Clerks, or of their Clerks; the copies which it is necessary each party should obtain of his adversary's proceedings are made there, and charged as *office copies*, at a rate, in the proportion of ten to four, to the common rate of charge of a solicitor; and the copies are issued with that sort of dispatch which usually characterise mere official proceedings; in fact it is stated to be the cause of inconvenient delay, at the very time when dispatch is most valuable. A clerk in Court must be retained on each side in every cause, all notices in the course of the cause must go through this office, and through these clerks only can any communication relating to any step in the suit proceed. Now is not this as inconvenient a mode of conducting a law-suit as can well be imagined? the links between the Court and the suitor are already numerous enough, without the addition of this half confidential agent,



neutralising the responsibility of the solicitor, and calculated to extinguish all energy in the cause. The positive delays occurring in practice from this system, are feelingly described by the several respectable London solicitors who have been examined before the Commission, and it must be self-evident that the usual communications in a cause can be more expeditiously, and more conveniently made direct from one solicitor to the other, than through the medium of third persons. It is *of course*, that there must be a public office in which the pleadings may be preserved, and from which office copies (if any such be necessary) may be issued. The orders of Court proceed from a distinct officer, the Registrar; and the writs from other official sources. No act of the Court proceeds from the Six Clerks, and all forms not furnished by the respective offices from which they are issued, might be made out, as at law, by the solicitors. Many of the formal proceedings, will I trust, under the new regulations, be abolished; and I really am at a loss to understand, in regard to such as may continue, what is that *regularity* and *uniformity* of practice, which as a matter of essential benefit, the Commissioners think is secured by the continuance of this unnecessary intervention; let the rule be plain, and whatever is

valuable in regularity and uniformity is secured, all other obedience to such points would be only so much of incumbrance and embarrassment. That the intervention of the Clerk in Court is unnecessary and highly inconvenient, I appeal to the evidence of *Mr. Wimburn* and *Mr. Forster*, founded on the best of guides, practical experience.

It will here be best to introduce, as connected with the respective duties of the clerk in Court, and solicitor, one point of practice, which if it could be adopted, would tend in the most direct and effectual manner to the accelerating the whole of the proceeding. It is, the abolishing entirely the use of office copies of proceedings in every stage of the cause, excepting only proceedings originating with the Court or its officer, such as the Decree, and the Report of a Master. The single question is, whether copies can be more conveniently, expeditiously, and cheaply exchanged between the respective solicitors; no idea of the propriety of continuing fees for the purpose of remunerating officers of justice, ought to interfere with any case conclusively made out of advantage in the conduct of the cause, by abolishing such a system. The plan would apply to the bill and answer, and to all the proceeding in the Master's office not originating there. By the introduction



of the practice of the plaintiff's delivering to the defendant a copy of the bill, as soon as the defendant has appeared to the process, advantages of the first importance will arise. At present the defendant has to obtain at a considerable expence, and with a delay, often of many weeks in a Country cause, an office copy of the bill, and he is unable to take any step whatever towards his defence until he can have seen and been advised upon it. The Copy must be furnished from some source, and will ultimately form part of the costs in the cause, and it really therefore does not seem very material whether it be in the first instance at the expence of the plaintiff or defendant. The copy can be made more conveniently and expeditiously by the plaintiff's solicitor; at Law a copy of the declaration is so made and delivered; and besides the general acceleration of business to be obtained by this mode, just at the right time, in all cases; there would in injunction causes arise a particular convenience, if not a positive act of justice; by affording to the defendant the earliest opportunity of answering the case made out for that special interference of the Court; and in all cases, I do not know but that in the course of time, it may have a salutary operation in encouraging a little curtailing of the length of the bill, and of



other proceedings to which the rule might apply. There appears to be no sufficient reason why such a regulation should not include the Answer, the Amendments in a Bill, the Exceptions, all Petitions, and in short every proceeding originating with the party; and in case of several defendants, each *solicitor* only for the defence, would be entitled to a copy. This is a practice which obtains in the Ecclesiastical Court, and is found practically most convenient and beneficial. The public will know how to appreciate the value of the recommendation of such a rule by *Mr. Forster*, *Mr. Vizard*, and *Mr. Wimburn*.

It is not very clear upon the propositions, how notice is to be given by each party of his having taken that step in the cause, which will make it incumbent on the adverse party to proceed within the limited time, but this is a matter easily arranged.

## CHAPTER VII.

*Equity Practice.**The Pleadings. Parties.*

THE delays in the Court of Chancery may be fairly attributed to defects in the *process of the Court*, in the *system of pleading*, and in the *mode of obtaining evidence*; any delay after the preparation of the case for hearing, is attributable to the Court itself. The matter of mere process is so technical, that a few incidental observations will be sufficient on the present occasion. The system of pleading involves many material points directly affecting not only the dilatoriness of the proceedings, but the essential administration of justice. The mode of taking evidence is one of the highest interest, and will hardly yield in importance to that final cause of delay, the defective means in obtaining the decision.

In regard to the *Process* to compel appear-

ance and answer, it is proposed there shall be a separate writ of subpœna for each defendant; as it is presumed a copy is to be served, no sufficient reason appears, why the names of all the defendants might not be inserted in one writ. The consequence of the alterations suggested will be, that personal service will not in any case be necessary. There may be no objection to this alteration, it being already the practice in the Exchequer; but in reference to an attachment as following such service, it may be essential to look strictly to its practical effect. If the defendant is not taken on an attachment, supposing him not to appear upon service, the ultimate process is a sequestration against his property. If the defendant be taken on an attachment, the propositions do not seem clearly to contemplate the duty of the Sheriff. It is usual at present, to take bail in a nominal sum, the Sheriff not being bound strictly to take bail at all; if it be proper that that he should take bail, the sum should be fixed, and the law defined. Supposing then the defendant to be on bail, if, as the proposition at present assumes, it be indispensable he should be in actual custody before the bill can be taken *pro confesso*, a second attachment appears to be necessary to bring the defendant into actual custody; but supposing the subpœna



to have been personally served, so that the defendant must clearly have had notice of the proceeding, that writ conveying a plain intimation of the consequence of disobedience to it; it might then be sufficient, with a view of further simplifying forms, that the Court should be authorised in the absence of the party, to take the bill as confessed, and decree according to its prayer, without the defendant ever having been in prison at all, either of the Sheriff, or in the *Fleet*.

In respect of the mode of putting in an *Answer* in the Country, there is one great inconvenience not adverted to in the Report, the practice of issuing a special commission for taking every answer; the consequence of which is, that if there be several defendants, and they intend to put in a joint answer, the parties must all meet together for the purpose; or if they put in several answers, unless they meet, there must be several commissions; it is otherwise the cause of needless delay and expence; there does not appear to be any valid objection to answers being taken before some permanent officer of the Court in the Country; either a select Master Extraordinary, or perhaps before a magistrate; notice being given of the time and place to the opposite solicitor. Again, at present the answer is required to be transmitted

by a special messenger, who delivers it, sealed up, on oath, at the public office; a form, if unnecessary, obviously very inconvenient. Perhaps it may have obtained from an idea of its necessity in order to afford the proper links of evidence on a prosecution for perjury; but on such an occasion it is merely necessary to prove the identity of the party, and the signature of the person authorised to administer the oath; proofs equally accessible, were the answer transmitted, more agreeably to modern habits, and as in fact answers are now received from Ireland, by post.

But to proceed to matters of more general interest.— Much evidence has been taken on the subject of avoiding the great *prolixity of pleadings*, an evil which tends to distract the attention, to keep out of sight the real merits, and to encumber the suit with costs. The bill has been sometimes called a story three times told; in fact, first detailing the whole circumstances of the plaintiff's case, it proceeds to state the legal points, and to assume a case for the defendant; then after describing the grounds of the relief sought for, it proceeds to interrogate the defendant, not by a mere general requisition to answer fully to the matters of the bill, which might on first impression be considered as sufficient to every useful purpose.



but by minute interrogatories repeating each circumstance of the plaintiff's case, and calling for an answer to a particular question upon every point, guarded by all the words which legal ingenuity can invent. Such interrogatories so framed, are considered by those who from experience are best able to judge, necessary for the purpose of extracting from unwilling defendants, every part of the discovery which the plaintiff is entitled to.

The Commissioners justly consider that the restraining of prolixity must be confined to matter of recommendation only, and cannot be made the subject of any positive rule. That pleadings might be more succinct, is admitted by those of the best experience on the subject ; and admitting the necessity of the interrogatories, still both bill and the answer might be more confined to simple statements of fact. But prolixity, as the author of the *Considerations* observes, is the vice of the age ; like other matters of mere habit, it will correct itself ; the legislature can do no more than prevent its becoming any positive impediment to the current of justice.

To advert to another point regarding the substance of the pleadings, —is it necessary that Equity suits should be encumbered in every case with all the parties that can be interested



in the subject? The evil of the present rule, from the necessity of new proceedings on the deaths of parties, and other changes of interest, during the long progress of an Equity suit, is too obvious to permit any hesitation as to the advantage of every modification of the rule, of which it may with justice be susceptible. The aim of a Court of Equity is, by deciding on the rights of all interested, to do complete and final justice; and for this purpose all persons materially interested, however numerous, must be made parties to the suit. The more prominent exceptions to this rule, are persons only consequentially, and not directly interested; such as the tenants of a Manor upon a suit as to a custom; persons in remote remainder in a settlement of real estate; or a set of creditors under a trust deed, or of legatees under a will, who are considered as bound by a decision upon the fund, without being parties, having however a right each to promote his claim in the suit, and knowing that his interest will be protected with that of the whole class of which he is a member.

This principle in regard to creditors and legatees has been adopted for the sake of convenience, and has been found practically useful; and the point is, whether it has been extended to all cases that may fairly be consi-

dered as within the same principle. Where numerous parties are entitled to share the residue of a real or personal estate, all are made parties,—one witness mentions a case of fifty seven defendants, and another of sixty ; they may be extreme cases, but to a certain extent the principle is applicable to a large proportion of suits ; and when we consider that an answer must be obtained from every defendant before the suit can move, and that upon every change of interest by death or alienation, a new proceeding in the shape of a bill of revivor becomes necessary, it does become a matter of some consequence that the principle which the convenience of mankind has forced on the Court, by way of exception to the strict rule of justice, should be extended as far as an adherence to substantial equity will admit. This point is peculiarly of importance in regard to Trusts, forming as they do so considerable a proportion of the business of the Court. In the inimitable Treatise on Equity pleading it is stated, that trustees of a real estate for payment of debts or legacies, may sustain a suit either as plaintiffs or defendants, without bringing before the Court the creditors or legatees for whom they are trustees, and the rights of the creditors or legatees will be bound by the decision. It is



of importance to consider whether this principle may not be beneficially extended ; whether in every case of a Trust, the trustee has not a right to the direction of the Court, not merely in the common course of suits, making parties thereto, all persons interested in the trust fund, and whereby the trustee claims the privilege either of placing the fund and its administration in the power of the Court, or some specific relief acting upon that fund, but in some more simple mode of proceeding, applicable to *properties of small value*, without all the interested persons being parties ; wherein the Court declaring the true construction of the trust, the trustees might receive on all occasions, every direction necessary, and every protection that a responsible situation could reasonably require. It would be for the benefit and security of the fund itself that such direction should be easily accessible ; and if persons interested had an opportunity, by notice, of being heard in protection of their rights, justice might possibly be ensured at a decreased rate of delay and expence, and an increased facility in the administration of Trusts.

The language of the Report is this—"It  
 "appearing upon the evidence that doubts have  
 "been entertained whether upon a bill filed by  
 "any party interested, or by an executor or other



“trustee for the construction of any will or other  
 “instrument, or for the direction of the Court  
 “on any matter of trust, it is in the discretion  
 “of the Court to confine its decree to the parti-  
 “cular relief prayed by the bill, without taking  
 “upon itself the general execution of the trusts  
 “of the will or other instrument; it is expedient  
 “that it be considered that such discretion does  
 “in all cases reside with the Court.” There  
 is no point on which the evidence of men, the  
 most experienced at the bar, appears to be  
 more undecided than on this; and perhaps  
 there is no one of the propositions where the  
 matter appears to be left in a way more incon-  
 clusive. It amounts to this, that if relief be  
 be prayed—if a certain object in the perform-  
 ance of the trusts is to be effected—if real or  
 personal estate be to be sold or dealt with  
 under the powers of the Court—an account to  
 be taken, or waste restrained—or other matter  
 of specific relief prayed; that then the Court  
 will, in dealing with such fund or such object,  
 decide on the construction of the instrument  
 creating the trust, as incidental to the relief;  
 but the point rather appears to be this, whether  
 if an executor or other trustee, or any party in-  
 terested in a trust, wishing to ascertain the  
 construction of a will or other instrument, or  
 for the direction of the Court in any matter of

administration of the trust, shall apply to the Court by bill or petition, for they are in substance the same, setting forth the difficulty; *not* calling on the Court to assume the administration of the trust; *not* requiring the interference of the Court to effect the object; and *not* therefore praying any relief;—whether in such a case, for the guidance and protection of a trustee, and for that purpose only, the Court not in its discretion *may*, but in its ordinary course will, declare the true construction, direct the trustee in carrying it into effect, and therein decide on the rights of all persons beneficially interested, either so claiming the decision of the Court; or who shall have had, in such form as the Court shall for this purpose direct, notice of the proceeding, and an opportunity of being heard.

Such a mode of proceeding would preclude injustice, and appears necessary from the nature of trusts. Without it, in a large proportion of trusts, the trustee must incur unnecessary responsibility. The present declaration in the Report appears to mean, that unless specific relief be prayed, no decision on a trust can be obtained without all parties interested being before the Court. The principle upon which that declaration rests is probably this, that it is the purpose of a Court of justice to decide



upon litigated rights, and give relief where relief is wanted; and not to give speculative opinions. The relief that is wanted in the present case, is the protection of trustees in a way not ruinous to the trust fund,—the rendering practicable of execution in all common cases, those trusts which the law authorises. If as the Commissioners observe, “the chance of being involved in a suit is sufficient to induce most men to shrink from the responsibility of acting in any complicated or extensive trusts without the sanction of the Court;” And if therefore, as they admit, “that indemnity ought to be afforded with the *least possible expence and delay*,” the question is reduced to this, whether the present or improved practice of the Court will afford indemnity in its true spirit and effect, to the extent admitted to be just and necessary.

It has hitherto been understood, that the decision of the Court could not be obtained upon the construction of the trusts, without submitting the whole administration of the trust to the Court. Under the new declaration of the law, the decision may be confined to some partial relief, but the main inconvenience will still remain, that without going through the whole stages of a suit, bill, answer, evidence, accounts, and Master’s report, a decision upon the construction may not be attainable.



## CHAPTER VIII.

### *Equity Practice.*

#### *Trusts.—Administration of Assets.*

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IN connection with the preceding chapter, it may be more convenient here, to introduce such remaining observations as regard the character of a trustee, and the administration of assets.

One of the largest branches of Equity jurisdiction, is the administration of effects under a will or intestacy. The character of an executor or administrator may for our present purpose be considered precisely analagous to that of a trustee. The state of the law with regard to the payment of debts out of the property of a deceased, will be considered in a subsequent part of this Inquiry ; and certainly the necessity of a revision of the law, upon no subject is more clearly demonstrable. The present purpose is to inquire, how far a trustee

generally is sufficiently protected by the Court, and how far the Court assumes the actual administration of trusts, to an extent inconvenient and unnecessary.

It is another and important question how far the law of real property is not unnecessarily involved in Equitable interference, by its being so often subjected to the jurisdiction of a Court of Equity, by what may be termed a mere fiction of law, -- the refined distinction between uses and trusts. That point cannot be usefully discussed until we enter upon the second part of this Inquiry, the law of real property. By amendments of the law of no violent character, the necessity of trusts, as well as their extent in duration, might be very much lessened and avoided; and Courts of Equity be more confined to the useful part of their jurisdiction over trusts, the general direction of the trustee, whether named by the party or appointed by the Court, in the execution of the trust.

The Propositions in the Report, with regard to proceedings upon the administration of Assets, are adopted for the purpose of ascertaining at an early period the state of the fund, the securing it in the Court if so required, the enabling any party interested to expedite the suit, and the preventing any payment to a

creditor by way of preference. The propositions appear to be well adapted for the purpose designed—that of a speedy and equal distribution of effects amongst creditors; but without adverting at present to the defective state of the law of administration, the question is, whether both in regard to administration of assets, and the execution of all direct trusts, the machinery of the Court of Chancery be well fitted to execute the whole business of the Country; whether individual agency and consequent responsibility, is not absolutely necessary in all details; and whether trustees and executors so acting, have duly invested in them all necessary powers, and are satisfactorily protected in the honest execution of their duty.

The purport of the reform introduced by the propositions into the practice of administrative suits, is to throw all administration of assets into a Court of Equity. It is impossible that the business of the Country can be conducted in that way. The business of administration of assets, is one of such continual operation all over the Country, that nothing but a jurisdiction extending itself locally into the Country can possibly effect its object usefully for the public. It seems to be most agreeable to the legal constitution of the Country, that if the jurisdiction over wills of personal estate, and



the granting of administration in case of intestacy, belong to the Ecclesiastical Court, the administration of assets should be the subject of Equitable jurisdiction. It is only required that this jurisdiction be locally and conveniently exercised ; and if the powers now exercised in a Master's office could be extended so as to be put into operation in some plain and easy manner, in the different parts of the country, it might prove of the highest advantage in saving expence, preventing litigation, relieving executors from unnecessary responsibility, enforcing the payment of debts and the distribution of property, and ultimately saving the time of the Court, and putting a stop to many a case of injustice and vexation.

Such an extended machinery would be found useful in many other parts of Equity practice. The inconvenience to a large class of creditors or legatees, of proving their debts before the Master in London might be avoided, and some plan might be founded upon it, whereby an early statement of the situation of the assets of a deceased might be made and recorded, no more than every executor is now required to make for the purpose of the legacy duty, so that all parties interested might be enabled better to see their way, and the proper course to be pursued for the final settlement of the affairs.

How far a proceeding by way of bill and answer might be necessary, as a foundation for such an inquiry into assets in every case, will be a subject for consideration. If an executor was bound to record such an account within a limited period, it would remain for himself or for any party interested to institute a suit if found necessary ;—if such a suit were found necessary, any party might then according to the Propositions call for the security of of the fund in Court, and the direction of the Court upon questions of legal difficulty, ought in all cases to be attainable, by means of some summary application,

The controul over administration of assets, is at present inconveniently divided between the Courts of Equity and Courts of Ecclesiastical Jurisdiction. The Ecclesiastical Court has the proving of the will, and the granting the administration. Its forms require an inventory, but in practice it is rarely exhibited. A legatee or person entitled to the residue, may in that Court call upon the executor to deliver an inventory, and enforce the payment of a legacy or distribution of the residue ; and at the instance of such a party, the account may be examined, controuled, and settled. A creditor also may call for an inventory, but to little avail, because at his suit, the Court has



no jurisdiction to enter into the account. In a Court of Equity the whole account is gone into at the instance of any party interested, legatee or creditor, or of the executor himself; and in several points the remedy for a legatee in a Court of Equity is more effectual, that Court dealing with the real as well as the personal estate, to which latter the Ecclesiastical Court is confined, besides that it in many respects wants the powers to effect a full administration, to provide for abatement amongst legatees in case of deficiency, and to do effectual justice between the parties.

The consequence has been, that in practice, suits for the administration of assets are, wherever the funds will afford it, brought in the Courts of Equity. A creditor legatee or other party interested, not unfrequently cites an executor into the Ecclesiastical Court, to give an inventory and account, but more as a matter of annoyance, and thereby to drive him to do justice, than as ultimately expecting by this means to compel a just distribution. If a creditor goes against an executor into a Court of law, he may be undertaking a proof of assets without the means of discovering what is necessary for that purpose, or his object may be defeated by a voluntary payment during the suit, of another debt in preference. A Legacy



cannot be sued for in a Court of Law, and for good reason, because that Court cannot direct a just and equal distribution of the effects. The forms of the Ecclesiastical Court proceed upon the idea that the executor and administrator will have to account in that Court ; the executor is sworn to make such an account, and the administrator gives a bond with sureties to that effect ; the bond is in double the value of the effects to whatever amount they are, but as the bond is merely for the putting in the account, and no inquiry is ever made as to the substantiality of the sureties, such a mere form proves a great inconvenience in practice, and throws much discredit on the law. The inventory and account is a matter of substantial justice, and it is but in accordance with the laws of all other Countries that an effectual and complete inventory should be delivered within a stated period into some Court of competent jurisdiction, where it may be examined by the parties interested, and made the foundation of proceeding to enforce their rights. Either then, the exhibiting the inventory in the Ecclesiastical Court should be substantially required, or the form of the oath should be altered to meet the practice, and the nominal sureties of the bond be discontinued. Substantial sureties, except upon cause assigned, should

not be required; and how far in every case an inventory should be required in a limited period under a penalty, without being called upon by any party, and whether to be exhibited in the Ecclesiastical Court, or a Court of Equity, will remain for the Legislature to decide.

The declaration of the law in the Report, that the Court will give direction as to a trust when any relief is prayed, without taking upon itself the whole administration of the fund, will be of no avail with regard to the administration of assets, or for any trust for creditors under a deed, because there the only relief is, the whole administration of the fund. Looking therefore to the constant occurrence of such cases, applying to properties of all description, large and small, it is very desirable that both the means of obtaining the decision of the Court upon legal doubts, and of applying the powers of the Court to an effectual execution of the trusts, should be facilitated. If the Court takes upon itself the whole administration, any dealing with the property is at once suspended, and the very essence and intent of the arrangement, the conversion of the property into money and its equal distribution, is unnecessarily impeded and retarded.

Some more effectual, more *mercantile* means



should be adopted in these cases of converting and distributing the funds ; and if the machinery of the Court is found inconvenient in such cases, much more is it inapplicable to the common management of real property.

We are told that a trustee is to deal with property as a prudent man would with his own. Upon that principle, the trustee ought to be left at liberty to make the property productive at his free will and discretion, and ought to be entitled to use all those means which an owner would for that purpose, without the necessity of the aid or indemnity of a Court of Equity, and subject only to the proper responsibility for the abuse of his trust. But in fact a trustee can neither grant nor vacate leases, nor employ agents at the costs of the estate, nor abate rents, nor improve buildings, or do any acts of that description which a provident owner would not hesitate to do, without throwing the whole administration into a Court of Equity, and calling for the inconvenient exercise of its powers in every particular instance in which its indemnity is required.

In many of these observations I only repeat the opinions of men of the first experience at the bar. Mr. Roupell thinks that the remedy by petition might be extended to many simple cases where the Court is only called upon to



decide upon the construction of a will or written instrument, in the same manner as it exercises jurisdiction under Sir Samuel Romilly's act in charity cases. Mr. Bickersteth says, we often have to regret that the opinion of the Court cannot be had in the first instance upon the construction of a trust in a will or written instrument, without a bill, which may have the effect of devolving the whole trust on the Court, without taking all the accounts and ascertaining the whole fund.

Mr. Bell observes, that suits by individual creditors or legatees were formerly common, but now the convenience of distributing assets in one suit, is so universally felt, that it is the general practice to frame bills for a general distribution; and he suggests, that executors and trustees for payment of debts, might with propriety in all cases be obliged to file their accounts in a proper office for that purpose, where parties interested might have access, and for omission to do which the executor or trustee might be made liable to costs. The difficulty he contemplates, of such an account giving an opportunity to any creditor to bring an action, and thereby making it necessary to file a bill to restrain him, might easily be obviated by giving the creditor no remedy but in a Court of Equity, provided the means of that remedy were made

cheap and expeditious. His conclusion is, that *the whole law as to the administration of assets requires revision.*

Without deviating from established rules, he conceives that much of the evil might be removed by the adoption of some plan to compel a speedy statement of the situation of the assets of the deceased, long before the accounts of a complicated estate could be wound up. He considers it to be the duty of an executor and trustee to be ready at a short notice to render an account of their receipts and payments, though it may be difficult to get in the property, or state balances of long accounts ; and a creditor may soon carry in his claim, verified upon oath, although it may take a long time to adjust it. If therefore in decrees for account of assets and other trusts of that nature, the decree was to be acted upon, and advertisements published for creditors to come in within a short limited time, giving an enlarged time for foreign debts, and the best report practicable made in a short time, and no creditor allowed afterwards to claim without special reason ; it might enable the Court frequently to act with advantage before a final report, and the parties to urge the cause with more effect.

Mr. Bell is of opinion that the Court is too tenacious of its general principles in not



deciding points of law until accounts are taken, or enquiries made bearing on those points ; a judge should not be obliged to decide points which may never arise, but when it is clear that questions must arise, it is better they should be decided in the first instance, and for that reason to allow separate reports, and encourage the decision on those points which can be detached from the other inquiries. In many cases a decision of points of construction may relieve a case from many parties and much expence, which is prevented by the general rule of taking the accounts before the rights are decided, and in an early stage a report might afford many facilities in thus accelerating the cause : it may for instance by such report appear, that there are assets to pay admitted debts and legacies, leaving sufficient for undecided claims ; observing, as he justly does, that it may be better that those who by negligence or misfortune are prevented from bringing their rights to decision should run some hazard, than that numerous creditors or legatees should have their rights suspended.

The benefit of an *Early Report* of this sort would not be confined to suits for the administration of assets ; it might be applied to all trusts and suits of many other descriptions, and in conjunction with a reform in the office of



the Master, making the Master active in the direction and controul of the suit, a system of this kind might effect an improvement in the whole operations of the Court of the most extensive and beneficial nature.

Mr. Bell proceeds to make observations upon the practice of the Court in regard to controlling the conduct of trustees, which are of the highest value. Observing that by such an early report the Court might be enabled to proceed to the sale of a real estate at the time the other accounts are taking; he adds, *The Court should not interfere with trustees executing their trusts without the aid of the Court, though the Court be in possession of the cause, and the accounts are taken, unless there are grounds to doubt the propriety of their conduct, and the parties desire it.* Why, though a suit is depending, may not a trustee proceed to sell the real estate, and pay the money into Court, if the parties wish it, rather than have it sold in Court? *If a testator or parties place confidence in any person, why should not a Court of Equity do the same?* And why should not they be encouraged to pay creditors where they are satisfied of their demands, rather than they should be driven to prove their debts before a Master? By such variations in practice he thinks much may be done

for the suitor ; and that although the Court has lately much relaxed its strictness in some points, still more may be done.

I will conclude this subject by adverting to an opinion entitled to much weight, that of the present Lord Chief Baron. I find in his evidence an express opinion that it would often be right that a trustee should be by a decree authorised to proceed by himself, without going through the ceremony of the Master's office.

How far it is necessary that the powers of a trustee should be defined by the Legislature, is matter for consideration. It may be requisite for the Legislature to interfere to legalise certain powers necessary for the execution of the trusts, and for the administration of assets, coupled with that general revision of the law of assets Mr. Bell recommends ; giving to the trustee power to obtain the directions of the Court upon petition, and facilitating the operations of the Court for that purpose.

One principal object in view is that of encouraging those persons to act as trustees and executors who are best fit for the situation, and I am confident there is not a greater boon that can be conferred upon the Country, than a Law by which all the benefits of trusts may be secured to the community, without those impediments with which they are now encumbered.

## CHAPTER IX.

### *Equity Practice.*

#### *The Answer.*

THE more immediate points proposed to be examined, in regard to the *Answer*, are, how far the form of an answer might in some cases be dispensed with altogether; whether the mode and system of answering is sufficiently beneficial to the defendant; and whether, even under the reformed practice, the defendant will have all the advantage to which he is fairly entitled. The plaintiff has either a case which he can prove without any discovery from the defendant, or he wants that discovery to establish his case. The defendant is held to every species of discovery, which may either be essential to the plaintiff's title to equitable relief, or to establish his right at law. The answer of the defendant is not like the oath of the party, whether called for by the plaintiff or by



the Court in codes founded on the civil law, where the plaintiff having referred to the defendant's oath, is bound by his answer. Nor is it like the oath that the defendant is entitled to offer in the action of debt upon simple contract at common law, where it is equally conclusive. The answer in Equity, is a discovery which the plaintiff is entitled to use or not as he pleases, and just so far as he pleases; it seems to be merely therefore justice, that the answer should in every respect be placed upon a footing as beneficial as possible to the defendant, provided the plaintiff has the means of meeting evasion, and insisting upon the discovery of the whole truth.

In many cases the plaintiff has no occasion for any answer, and under such circumstances, allowing of course to the defendant an opportunity of stating his case in his answer, in order to adduce his proofs, there seems no reason, why the plaintiff should not be at liberty to proceed to a hearing without an answer; which at present he cannot do, except after prosecuting the process of contempt to its utmost extent. It is true that the parties may consent to the putting in a mere formal answer, *without oath or signature*, reducing the answer to a mere form, but then the defendant may in every case, at his option, take the whole time

for answering allowed by the Court. By the present practice in the case of an amended bill, the plaintiff has the option of requiring an answer or not, and is at liberty without an answer to proceed to prove the matter of the amendments. Is it not desirable to give the same option to the plaintiff of dispensing with an answer to his original bill? The suggestion is made in the evidence of *Mr. Bickersteth*, and is entitled to much consideration. In bills of foreclosure, he observes, where nothing is required but to prove the mortgage deed; in bills for specific performance where no more is required than the proof of the agreement; bills for administration of assets where it is only requisite to prove the representation, and other similar cases, the plaintiff having the proof of the case in his possession, might, if he could waive an answer, be ready for a hearing in a few days after his bill was filed. He thinks that enabling the plaintiff to obtain a decree without answer, the defendant of course being at liberty to put in an answer, would be a great encouragement to him to do so. He proposes that the bill should contain an intimation that an answer was or was not required. *Mr. Bickersteth* even proposes to go farther, and that in some simple cases the subpoena might entirely supply the place of a bill, but if a



bill be drawn in a simple form, the providing a similar remedy under another name might only lead to more complication. The opinion of *Mr. Shadwell* appears to tend to the same point, he thinks that an alteration of this sort, dispensing with an answer, might be made with great convenience, the notice appearing upon the face of the bill ; that there are many cases in which it might be an advantage to the plaintiff so to proceed ; cases on which all the facts are agreed on by the parties, and in which they might all be admitted in some very short way ; and although he does not think a subpœna could be made to answer the purpose of a bill, he sees no objection to the enabling the plaintiff in any case at his option to dispense with an answer.

Exceptions to the sufficiency of answers are very common ; one important new rule proposed in the report is, that the Masters decision upon the insufficiency of answers shall be final, the master always taking into consideration the relevancy and materiality of the questions. Upon this subject the opinion expressed by the Noble Author of the *Considerations* is highly important. He justly observes that the whole merits of the cause may depend upon the answer ; that attempts to exclude the final judgment of the Court itself on appeal from the



judgment of inferior officers in matters of any importance, is liable to great objection, because it may make the issue of a suit depend, not on the decision of the superior Judge, but on that of an inferior. That a power of judgment without appeal is always a dangerous power, and more especially when to be exercised *not in open Court subject to general observation, but in the private chamber of one of the ten Masters in Chancery*, when the other nine in a similar case might have decided otherwise, and the Court if it could be appealed to, would have given a contrary decision.

This observation as applied to the decision of a Master delivered in private, is of the highest value. According to the present constitution of the Court, so long as the sittings of the Masters are in private, I cannot contemplate that decisions emanating from such an authority, upon any thing beyond the mere limitation of time for different proceedings, and the carrying into effect the order of the Court,—that any judgment upon the merits of the cause, so delivered, will be satisfactory to the public. But it will be one of the most important reforms which I shall take the liberty, with much diffidence and true deference, to suggest, that *the sittings of the Masters should be in public*. I am aware of the objections that will be instantly

urged to such a proposal,—that their proceedings are in their nature not calculated to be conducted in public; that the common course of their business would be needlessly impeded, and their usefulness destroyed. Upon all these points I should be prepared to take issue. Matters of account, as is suggested by one of the propositions might be referred for preparation, not for decision, to an accountant; or they might be prepared by a clerk, or by the master in private; matters of substance in the account may form some of the most essential merits of the cause, and ought to be discussed in public. There may be private matters relating to family transactions, in cases of infancy, guardianship, lunacy, marriage settlements, and other cases of that nature, which the Master might in his discretion think it more fitting to hear in private. Let him be at liberty to do so. General rules should always admit of exceptions where justice or convenience requires; but the great question is, whether if the Master's office is to be made of essential service in aiding the operations of the Court, it is not absolutely necessary, for the security and satisfaction of the public, that it be an open Court. I do not feel it necessary for this purpose to advert to the practice of gratuities to the Master's Clerks, and that of the Masters having been hitherto paid



by fees depending on the length of the proceedings; it is sufficient for the British people to know that such a custom has existed, to decide that it shall no longer be continued.

There is a general intention to be collected from the Report, that the functions of the Master should be enlarged, and the usefulness of that office extended. I much mistake the spirit of the Country, if that situation can be made acceptable for any higher purposes than those in which the Master is at present occupied, unless the whole machinery of this department of the Court be laid effectually open to the public view. Surely, had such been the system, the practice of gratuities to the clerks could never have so long existed. If, as the Commissioners justly observe, uniformity and regularity of practice be desirable, will not public sittings, and an habit of business being gone through at one time and not perpetually adjourned from one short sitting to another and an increased facility of attending by Counsel, tend much to obtain it? There appears by many parts of the evidence to be a want of a uniform system of business in the Master's Offices, and if the new regulations introduce new principles, at the same time as far as they enlarge the discretion and increase the authority of the Master, they may introduce further variations in prac-



tice. A new system will want experience to to work it right ; for this purpose the Report recommends communication between the Masters, but as uniformity must arise not only out of the practice of the individual Masters, but that of the body of Solicitors and Counsel, it is more likely to come out in a defined shape, from that compound of science and intellect which would be thrown together in a public Court. Looking to the mere personal convenience of solicitors and counsel, and particularly adverting to a point which the commissioners have thought to demand a distinct proposition, the attendance before Masters by solicitor's clerks, an open Court, in which a certain number of Masters would be sitting in different parts at the same time, would prove personally much more convenient to all parties, and prevent a great waste of time in the present want of punctual attendance to appointment, about which the evidence is full of complaints. The Report proposes to introduce *viva voce* examination by the Masters ;—no oral adverse examination can be effectually conducted in private. This is an improvement of the highest value, and is the admission of a principle, which ought to be extended to the whole system of obtaining evidence in Courts of Equity; it is of value that it be introduced in

any and every department. It may be said the plan of *viva voce* examination, as well as that of an inferior Court conducting matters of legal operation in detail, sitting in public, has been tried in the case of Commissioners of Bankrupt; and that the result may not be such as to encourage imitation. The conclusion from such an argument would be, not that Commissioners of Bankrupt ought to sit in private, but that a preference to privacy or publicity, as applied to the sitting of a Master of Chancery in the character of an Equity judge, (for in no part of his functions can he be considered in any other) is not to be drawn from the example of an individual sitting under a private commission. In short, much of the general obloquy by which the Court of Chancery has been assailed, originates from the Master's office; and there is no part of the proceedings of the Court in which any effectual improvement, any convincing reform, would be more gratifying to the public.

A suggestion of much importance has been made by *Mr. Bickersteth*, and appears to meet with the approbation of *Mr. Shadwell*. — It rather appears that by the old practice, a defendant was examined *viva voce* upon the bill, and his answers reduced to writing; that course is now only adopted after repeated in-

sufficient answers, in the nature of a punishment, and as a compulsory means of extracting from the defendant the truth. There are many cases of a complicated nature, where a defendant, without any personal communication with his counsel, and without better understanding legal points than can generally be expected, finds much difficulty in expressing the whole truth in legal language, adapted to interrogatories in the plaintiffs bill. It appears by the evidence that this difficulty is often felt by counsel, and they may be sure it is not less often the source of distressing doubts to the solicitor and the conscientious defendant. To meet cases of this sort it is proposed, to authorise every defendant, instead of putting in an answer in writing, to submit to be orally examined before the Master on the whole matter of the bill. *Mr. Bickersteth* considers it as a matter of valuable privilege to a defendant, and *Mr. Shadwell* observes that a defendant's voluntary exercise of such a power might be the saving of a great deal of trouble and expence to a plaintiff. In case of such an alteration, it will be necessary to have officers locally appointed for the purpose of taking answers in the country, probably under the title of select Masters extraordinary, and who could in many other ways be made a most useful appendage to the



Court. Such an alteration will be only a part of one general principle of reform in Equity jurisdiction, namely, that its operations ought to be brought more home, and laid more open to the public in all parts of the kingdom. It is a complaint occurring in various parts of the evidence, as well as apparent in the Report, and prominent in the Considerations, that much of the evil is to be attributed to the want of knowledge in the department of the solicitor. The great principle that I am adverting to, is the only effectual mode of diffusing into the Country that intelligence which the Court so much desires, and of which, if attainable, the advantage is beyond calculation. Mr. Bickersteth considers that if this system were adopted, of giving a defendant the option of being orally examined upon the bill, there would be an end of the necessity for the interrogatories; that it would be sufficient to be understood to be the rule of the Court, that the defendant was bound to answer the whole statement in the bill as to all matters materially within his knowledge. If answers upon this principle could be generally taken by persons competent to the business, it is not easy to conceive the extensive benefits that might be derived from such a practice to the whole proceedings of the Court.

In connection with this part of the subject

it has been proposed that the defendant, after answer, should always have a right to examine a plaintiff without filing a cross bill,—either upon interrogatories upon the matter of the bill, or by oral examination ; a plan impracticable without the aid of local officers.

The proposition authorising the defendant to insist upon all matters of defence, by way of answer, is a most valuable acquisition to a defence in Equity. The grounds of this proposition have been explained in the analysis of the Report, and it may probably be more matter of surprise that a contrary rule ever existed, than that the benefit proposed has been conceded.

The author of the *Considerations*, however, considers this proposition as involving questions of much difficulty, and admitting great room for doubt of its expediency ; but the weight of the evidence is decidedly in favor of it. The proposition goes to confer substantial justice on the defendant, and if there be those technical difficulties, which are apprehended in its application, the rules of the Court ought rather to be made to meet such difficulties, than on any account to interfere with the plain and palpable right that a defendant ought to have of insisting upon every matter of defence free from all technical impediments whatsoever. By the present intricacies of a plea, it is in evidence,



that a defendant is often deprived of the proper benefit of the merits of his case. *Mr. Bickerteth, Mr. Shadwell, and Mr. Roupell* concur decidedly in the amendment proposed, and at least it ought to have a fair trial.

With regard to a *Demurrer*, or peremptory defence in law, it is often improperly reflected on, and discouraged. There is no doubt but that the time allowed for a demurrer, even with the extension proposed in the new regulations, is too short to admit of parties not instantly aware of their right, and able to obtain the best advice, taking advantage of the proper defence that the law in such case allows them. The time for demurring at all events ought to run only from the time of the defendant getting a copy of the bill, which is an additional reason for requiring the plaintiff to serve a copy. If demurrers were more encouraged, there are many cases where, the facts being well known to both parties, the decision might be conveniently obtained upon a demurrer at a very early stage of the suit.

It is difficult indeed to discover any sound principle, by which the defendant in a Court of Equity, compelled to make every discovery which may help the plaintiff in his remedy, should be in any way hampered in the conduct of his defence; and the permitting



any impediment to remain as to limit of time or strictness of language, in the putting in of his full defence in law or in fact, in the shape of a plea or demurrer, does appear to be an unjust obstruction. So far as a plea or demurrer stops the plaintiff in the discovery or relief he may be entitled to, it is evidently just that there should be a speedy decision upon the validity of such a defence, so as to prevent its becoming the cause of vexation; but *dispatch in decision is the business of the Court*, and in such cases delay becomes injustice; because a party runs the hazard of suffering in the real merits of his case, by the want of that dispatch in judgment which he has a right to demand. Assuming then, there be no delay in giving the decision, there ought to be no restraint whatever upon the defendant as to the mode of his defence, and he ought to be fully at liberty to embody in his defence, call it an answer or what you will, the whole matter of legal defence he may be advised he is entitled to. At law the plea must be strict, because it must bring the matter to a point to be submitted to a jury; and a demurrer must reduce the matter to a point of law, which being decided makes an end of the cause; but in Equity the object of a *demurrer* is only to clear the way by a decision of some point of law, and if it goes against the defendant, it only

compels him to a further answer ; and there can be but little occasion for technical strictness in a *plea*, when the Court can deal with the whole case, can get at the truth, in the form most applicable to the particular questions which the suit involves, and mould the issues so as to meet the whole merits of the cause.

Upon the subject of answers, it remains only to notice the extraordinary rule that has hitherto prevented a defendant from having the fair benefit of his answer at the hearing. The plaintiff calls upon the defendant to discover, to admit or deny, all the matters relevant to the case within his knowledge. We have already observed, that the nature of an answer in Equity is, to give the plaintiff the benefit of such discovery, not to entitle the defendant to the benefit of his answer by way of proof--the consequence of this has been, that in practice the answer has never been considered, at the hearing before the judge, as any part of the pleadings, except so far as the plaintiff has thought fit to read that answer to the Court ; and not only so, but the plaintiff has been considered at liberty to read any part of the answer he pleases, and all the privilege the defendant has had is, to compel him to read out the sentence to the end, according to its grammatical construction. The new privilege



proposed to the defendant is, that he shall be at liberty, in such case, to read any part of the answer which explains or qualifies the passage read by the plaintiff. Such a rule may be open even to more technical discussion than the existing one. Is it not better that all points, both of grammatical construction and of explanatory or qualifying connection, should be entirely put an end to, by one plain rule, which the justice of the case appears to demand; liberty to read the whole of the answer?

The proposition introduces the distinction of reading the answer of the defendant by way of *explanation*, without giving him the benefit of the facts sworn to in evidence, unless proved. In the explanatory paper annexed to the propositions, it is stated to have been pressed upon the Commissioners, that an entire alteration should be made in the existing rule; and that by analogy to the rule prevailing at law, the defendant should be at liberty to read the whole of his answer, if the plaintiff read any part of it. The reply there given to such a proposal is, that the effect might be to put the suitors to much additional expence; that the plaintiff now only proves those facts essential to his case, which the defendant does not in his answer admit; and as to those facts which the defendant does admit, the plaintiff reads the



answer; and the apprehension entertained is, that if the plaintiff, by reading any part of the answer, was held to admit the whole to be read, then he would never be able to read any part of the answer at all, if it contained any material fact either denied or affirmed, the truth of which the plaintiff controverted; and thus the plaintiff would be put to the expence of proving that which the defendant was ready to admit. But this is assuming that the answer is to be considered as *evidence*, whereas the proposition assumes that no fact capable of proof is to be considered as in evidence, by being read from the answer. In this sense, therefore, it is difficult to understand why there should be any restriction at all upon either party, plaintiff or defendant, reading the whole or any part of the answer, which as to all points not capable of other proof, it appears but justice the Court should hear. *Mr. Shadwell's* evidence upon this subject appears to go the whole length of advising, in the strongest way, that the defendant should have the privilege of reading the whole of his answer, at least if the plaintiff reads any part of it, but even that condition hardly appears to be necessary. The plaintiff has every advantage in accepting so much of the defendant's answer as he chooses to admit, as evidence, and go into proof upon the rest, without in-

forming the defendant what he means to admit and what he means to prove, until after all opportunity of proof on the part of the defendant is over; the defendant is not entitled to insist upon his own answer as proof, upon any point capable of proof; looking then to this relative situation of the parties at the hearing, it appears but reasonable that the defendant should be at liberty to read any part of his answer by way of explanation to the Court.

The true spirit and purport of every improvement in Equity practice ought to be, to give to parties who are there compelled to submit all their rights to the decision of one man, the most speedy and effectual means of placing before that judge the whole merits of the case, otherwise that Court, which is essentially necessary for the maintenance of the varied interests of a free people, and calculated to meet injustice at every point, may, instead of being the best security of our rights, and the fountain of remedy, become only an engine of injustice and oppression.

## CHAPTER X.

### *Equity Practice*

#### *The Master's Office.*

NEXT in importance to accelerating the decision of the cause by the Judge, is the conduct of the suit in the Master's office; and the most efficient means of making that decision attainable, in a way satisfactory to the public, is to make it clear to public view, that every information bearing upon the merits of the cause, is necessarily laid open to the judge's mind. The great principle to be kept in view in all reform of Equity practice is, speedy and effectual inquiry into facts, and a speedy decision founded upon that inquiry; and in that inquiry the duty of the Master occupies a most important act.

The nature of the jurisdiction of the Master is peculiar, neither strictly judicial nor strictly ministerial; analogous in many respects to the character at common law, of the sheriff or the



magistrate. The design of the Master's office is, to inquire and report to the Court upon matters necessary for its information, in a way less dilatory and expensive, and more convenient to parties, than by the common routine of adverse proceedings; consequently the same judicial severity cannot be there preserved as is enforced in the Court; the forms of practice are properly more adapted to the convenience of agents; and it is the latter principle, which probably has introduced much of that abuse which it becomes necessary to controul.

The first and most efficient reform is that suggested by the Commissioners, of placing the Master more in the independent situation of a judge, by his being paid by salary instead of fees, and by making his decision in many cases final; the next is, by constituting the Master more an active power in the superintendence and acceleration of the cause. The latter is an alteration grounded on the experience and recommendation of the Masters themselves: it has the good fortune to meet with the approbation of the author of the Considerations; it has received the decided approbation of the Commissioners, and is an experiment which carries along with it every fair hope of success; it is a system however which

will require to be worked, before we can judge of its value or efficiency; and the public must not be taught to expect, that without their own full and zealous concurrence in such a plan, the good effects anticipated can be ultimately obtained. It is a large discretion, and, connected with the authority of final decision, will tend to place the Master much higher in public estimation than the station he at present enjoys; but such discretion cannot, as I have before observed, be safely and consistently entrusted to be exercised in private, and it will be better to suffer a little inconvenience, and by degrees to mould the forms of practice to meet a public sitting, than to lose the benefit of this extended discretion, or of that otherwise valuable reform, which will place the proceedings in the Master's office, as well as all adverse examination of facts, before the public eye.

Upon the propriety of paying the Masters by salary instead of fees, there cannot exist a doubt. The commissioners recommend the abolition of the extraordinary rate of charge upon office copies, and of gratuities to the Master's clerk; and that the other fees should remain and form a fund for the payment of the salaries. I must however express my surprise that after the exposition in the evidence, the



commissioners should have recommended the continuance of any payment in the shape of a fee to the clerk. One cannot with feelings of cool calculation, read upon the evidence, that the chief clerk of the Master, has in some offices received upon an average above *nine hundred pounds* a year, in the way of gratuities. It is a practice none will be found to advocate or palliate ; if salary is to be preferred to fees to save the *Master* from suspicion, with ten times the force does such a motive apply to the *Clerk* ; the principle must be imperative, and no fee whatever must be suffered to pass *directly*, to the emolument of either.

The duty of the master may be considered under these heads, — Deciding on disputed points of pleading, — Inquiring into facts, — Informing the judge as to the fitness of persons for places of trust, — or Executing the directions of the Court. In some of these duties the Master may be considered as only called upon to act when either party requests it ; and in such cases, if time sufficient be given to all parties to bring forward their respective allegations, justice will authorise the Master, in default of due diligence, to decide for the vigilant against the negligent ; and the limiting a time at the discretion of the Master, within which each proceeding must be taken, with the



power in the Master of awarding costs, may be sufficient to ensure due diligence in the cause. But as to many of these subjects of inquiry, such an *ex parte* proceeding can have no practical application ; there may be numerous persons interested who are not parties in the cause, or not adequately represented in interest, persons who practically have no means of accelerating the business ; the object of the Court is to inquire into and ascertain certain facts or circumstances, without which it cannot proceed to judgment ; in such cases, it is obviously proper that the Master should be authorised to direct every mode of proceeding which he in his discretion may think most proper for attaining the object in view.

So far from its remaining matter of doubt, whether the Masters should proceed of their own discretion to direct proceedings in such cases, it will be rather matter of surprise, that their authority has not been considered as extending to it, without either legislative or judicial interference. It only wants an uniform regulation of practice, founded upon this principle, to infuse the desired activity into this part of the proceedings. If the matter of inquiry affects the interest only of the direct parties to the suit, then all that the Master can do, is to lay down the course in which the

inquiry is to be conducted, and to limit the times within which each part of it is to be completed; and if the agents on both sides are negligent, and the Master has given notice, which he often with much advantage might do, to the *party himself*, of the course he is adopting, all possible ground of complaint for delay would be removed. But where the inquiry affects a class of persons, such as a set of creditors under an administrative suit, or of relations under a residuary bequest, the Master should direct the proceedings in the most efficient way for attaining the object in view, without reference to the particular convenience, and without being subjected to the negligence, of the agents conducting the cause.

This active power in the Master is under the present propositions confined to matters referred to him for enquiry; and it is not proposed to give him any direct interference in the pleadings, or in controuling the course of the suit. But it may be very useful to consider, how far some interference of the Court or the Master would not be advantageous in bringing the pleadings to the proper legal points in question, and directing the necessary inquiries whereon to found the decision of the Court upon those points. It is a proposal in the evidence of *Mr. Bickersteth*, that every



cause should immediately on its being instituted, be placed under the direction of a particular Master, who should have the government and guidance of it, in all its future proceedings. The general principle of legal proceedings in this Country is, that parties shall be left to conduct their causes in their own way, and no other plan would be congenial to the habits of the People, or so well adapted to the maintaining the high character of the English Bar, and the incalculable benefits derived from that character to the Country. But there does appear to be wanting in the conduct of an Equity suit some *active controuling judicial power, immediately after the pleadings, in order to give the cause its due direction*; to keep the parties in their right course; to point out the subjects of inquiry that may be necessary for the information of the Court, and the proper mode of proceeding in that object; to decide whether all necessary parties may be before the Court, and what more parties may be requisite to be cited; to say whether the several inquiries ought to precede the hearing of the cause or to wait for the decision; to suggest the modes of proceeding upon detached parts of the cause, which may save the time of the Court and the pocket of the party; in short



to direct what proceedings are necessary, and to place the merits of the cause before the Court in a way most beneficial to the suitors. It is a plan which may not apply to all causes, but considering the variety of agents concerned in the conduct of Equity suits, the hitherto undefined practice of the Court, and the important alterations proposed ; to the Country practitioner at least, and to parties dispersed about the Country, the existence of such a controuling power might prove of most essential service.

Now it is impossible not to perceive, that if such a directing power could be beneficially introduced, the character of the Master is that which might with most obvious advantage be invested with it ; and before we proceed to a further discussion of the Master's duties, it may tend much to the elucidation of the whole of this part of the subject, to take a view of the course of proceedings in the Courts of Scotland.

### *The Courts of Scotland.*

Founded on the result of Parliamentary inquiry into the practice of the Courts of Scotland, the Legislature, by an act of the

sixth of his present Majesty, have laid down a course of proceeding in plain and explicit language, applicable in its principles to the proceedings of all Courts, and from which hints might be advantageously derived for the improvement of practice in the Courts of every branch of jurisdiction in this Country.

The *summons* sets forth in explicit terms the nature and ground of the complaint, and the conclusions which the pursuer is by law entitled to deduce therefrom; the defender is in like manner in his *defence* to state in explicit terms every matter dilatory and peremptory on which he means to rely, and to meet the pursuer's statement, either by denying or admitting the facts, and in answer setting forth in explicit terms the facts on which he founds his defence, subjoining a *summary of the pleas* in law which he proposes to maintain. Along with the summons and the defence, the parties are respectively to *produce all writings* in their power. The averments are then made up and authenticated in a *record*. The lord ordinary, at the first calling of the cause, hears the parties on the dilatory defences, reserving the consideration of such as require proof, until the peremptory defences are pleaded, and the record adjusted; if he sustains any dilatory defence to the effect of dismissing the action

he at the same time determines the matter of costs, but if he repels such defences, the cause proceeds in its *course of preparation*, reserving the costs to the final decision ; the judgment of the lord ordinary is on dilatory defences final, unless the pursuer or defender, within 21 days, appeals to the judges of the inner house.

Where no dilatory defence is stated, or all such are repelled, the lord ordinary proceeds to examine the correctness of the summons and of the peremptory defences, and if it appears to him that the ground of action is not set forth in terms sufficiently clear, or the conclusion not legally deduced, he may dismiss the action decerning for expences, and reserving to the pursuer his right to bring a new action, or he may order an amendment of the libel and decree against the pursuer for expences ; or if it appear that the defender has not set forth his peremptory defences in terms sufficiently explicit in fact, and correct in law, he may order defences more satisfactory and correct to be given in, and decree against the defender for expences, the judge's decision in this respect being final, unless appealed from in 21 days.

If the lord ordinary be satisfied that the



summons and defences are correct, and that no further disclosure of facts or of pleas is necessary for the due preparation of the cause, he requires the parties to state positively whether they are willing to hold the summons and defences final, and if they so agree, then the clerk makes a minute of their assent, and the *record is complete*.

Where the parties do not agree to hold the summons and defences final, or where the judge thinks fit, he orders the pursuer or defender to give in, the one a *condescendence*, the other an *answer or mutual condescendence*, setting forth without argument, under distinct heads, all facts which they aver and offer to prove; and along with such condescendence the parties are to *produce all writings*. The parties are then permitted to *revise* their condescendences, each party lodging with the clerk a *concise note* signed by counsel, of his pleas in law.

The parties then appear again before the lord ordinary, for the purpose of *finally adjusting* their respective averments of fact, and notes of pleas, when it becomes the duty of the judge to hear their explanations, and examine their statements, and to suggest any new plea which may to him appear necessary to *exhaust the whole disputable matter in law or*

*fact* in the cause; after which the *adjusted pleadings* are subscribed by counsel, and the record authenticated by the judge, which forecloses the parties from any new statement, except that it remains competent to either party in the course of a cause to state matter of fact, *newly come to his knowledge*, or emerging since the commencement, with leave of the judge, and on payment of costs, such new matter to be stated within a limited time in a condescendence, to which the adverse party has an opportunity to answer.

The pleas thus stated are held as the sole ground of action, provided that any *new plea*, in relation to the facts alleged, may at any time be suggested by the Court. The lord ordinary in every instance, according to circumstances, fixes the time within which the pleadings are to be lodged, which is not extended but on payment of expenses, unless before the period fixed, special application be made for *prorogation*, which is never granted but on cause shewn, nor oftener than once; and on failure to lodge pleadings within the time limited, they are excluded.

After the record is closed, when it appears that the parties have *admitted on record* all the facts requisite to the decision, the lord ordinary may proceed to decide the cause,

or take it for judgment to the *Inner House*. Where the parties differ as to facts, which do not require to be ascertained by jury, the lord ordinary gives such orders for the *ascertainment of facts* as to him appears expedient, and such order is final, unless appealed from within 21 days. Where the parties differ as to facts which require to be ascertained by jury, the lord ordinary either remits the whole cause to the *jury Court*, or sends to that Court a particular issue, and his order in this respect is final.

When by these means the cause is by the admission of the parties, or the course of the proceedings, fit for *decision in the Court of sessions*, without jury trial, or when the parties concur in desiring to have a question of law or relevancy determined previous to jury trial, or when it is finally ordered by the Court, that any question of law or relevancy shall be so determined, or when the cause comes back to the Court with the verdict of the jury, the lord ordinary either proceeds to decide the cause, or he takes it to the inner house as he thinks best; and he may order the whole or any part of the cause to be argued before him, or direct *cases in writing* to be prepared and interchanged, after which the parties are to have an opportunity of being heard.



Every *Interlocutor of the lord ordinary* is subject to appeal to the inner house within 21 days from its date, and the party is required to *print* for the use of the judges the *record and cases*, and to deliver six copies to the agent of the opposite party; or if cases have not been ordered, the Court may appoint cases to be prepared and printed, and the Court orders arguments by counsel from time to time as it may think proper.

The lord ordinary may after intimation to the parties *report verbally* to the inner-house, any incidental matter, which may be disposed of upon argument, unless the Court orders cases.

Where the lord ordinary takes the whole cause to the inner house, he orders the parties to prepare and interchange cases; the case commences with a copy of the record as authenticated, and each ground of law or plea as stated in the record is separately argued. All *appeals to the house of lords* are limited to 2 years after the pronouncing the decree, or if the party be absent from the kingdom 5 years, or within 2 years after his return, or 2 years after expiration of infancy or lunacy. The authenticated record and printed cases form a document calculated to lay before

the House of Lords, in the case of appeal, a full statement of the cause.

Provision is also made for extending these regulations to the proceedings in the Ecclesiastical, Admiralty, and other inferior Courts, so as to establish an *uniformity of practice*, and to follow out the spirit of the act, so far as may be consistent with local circumstances.

It may not be deemed superfluous to have thus detailed the course of proceeding in the Scotch Courts. The plan of assimilating the practice of different Courts, is one of much interest, and which might be followed up in this part of the Island with very fair prospect of success; it would tend to the simplifying of proceedings, bringing them more to the level of common understanding, and making them more easy to be worked by the class of persons to whom they must be entrusted. In adverting to prolixity in Equity proceedings, it is not to be assumed that proceedings either in Courts of law or of Ecclesiastical jurisdiction are free from a similar objection, and success in any amendment of Equity practice may only the more awaken public attention to a similar reform of proceedings in other Courts.

The principle of Scotch proceedings, more immediately applicable to our present purpose,

is that of the *judicial controuling power over the pleadings*. How far such a system does or may work well in Scotland, where it is founded on previous forms of proceeding, it would be presumptuous in me to say; but in England I assume it to be clear, that the genius of our jurisprudence will not admit any such direct interference; still it may be quite consistent with principle, and highly advantageous in accelerating Equity suits, if the pleadings could be, immediately on their being concluded, submitted to judicial investigation, either to the Master, or to the Court; so as to ensure the cause going on in the right course, without a most lamentable waste of time and money. Upon this point the evidence of *Mr. Roupell* offers some very valuable suggestions; his proposal is, that after answer, if the plaintiff does not reply within a month it should be competent to a defendant to set down the cause for hearing, and after the plaintiff has replied, *he* should immediately do so; so that every cause should, within a short time after answer, be *heard upon the pleadings* and documentary evidence. Upon this hearing, the Court and the parties would at the outset be enabled to judge of the proper course that the cause ought to take; bills filed merely for discovery, or for delay, or vexation, would be in a situation to



be at once dismissed; such suits as involved matters of account would be referred to the Master; others which required an issue might be sent to a jury, and such as might be decided upon evidence, would be referred to proof in the usual course.

By this interlocutory proceeding, the parties would be barred from all power of suspending their causes; all would be brought to the view of the Court, and submitted to judicial consideration at the earliest stage, and those only permitted to linger through the present forms which should be shewn to require it. Mr. Roupell anticipates that by some short proceeding of this sort, *nine tenths* of the causes might be disposed of within a few months after their commencement. The great delay arises between the answer and the hearing; it is during that interval that by deaths of parties suits become abated, and bills of revivor become necessary; marriages of parties, and settlements of their property, bankruptcies and assignments of interest; birth of children and other changes of interests, make it necessary to file supplemental bills; petitions and motions for interlocutory orders are multiplied, where the cause itself, when brought to a hearing, must after all this delay be referred to the Master, sent to an issue, or dismissed;—and

where in many cases the decree is in the end merely one of course.

In the present mode of proceeding, a cause may occasionally be heard out of its course, as a *short cause*, but this can only be by consent of parties, where all are competent to consent, otherwise a cause which might have been summarily disposed of, or instantly accelerated, is set down perhaps at the bottom of a list of 200 causes, and goes through all the stages of the most complicated suit. This plan has already in some degree been submitted to experiment in the case of bills for specific performance, where after answer, if the case turn only upon title, either party is allowed upon motion to have the matter referred to the Master; and the want of such a privilege is constantly made the ground of motions to the Court for an injunction, or receiver, or some other relief on the discussion of which the judgment of the Court may be ascertained incidentally upon the main question in the cause.

The question is, whether the principle of judicial controul over the pleadings adopted in Scotch practice, and the course of proceeding thus suggested by Mr. Roupell, might not be in some measure advantageously combined in our Courts of Equity. Why should



not the pleadings immediately as they are concluded, be *referred to the Master* to whom the cause is originally ascribed, whose duty it should be, not as in Scotland to controul the parties in their pleadings, but to reduce the averments actually on record, to points of law and fact, and state them summarily under distinct heads, by which the whole matter of the pleadings might be made more intelligible to all concerned, and much labour be saved to the Court. It would be an improvement in practice, if the *summary of the pleadings* thus deduced, were ordered to be *printed* at the charge of the plaintiff, and copies delivered to the Master, to the opposite party, and ultimately to the Court; the cause would then be ripe for the first hearing, in a shape in which it might be taken, if required, as a short cause, with little of the present delay, and all of the benefit that is anticipated.

I am aware that the *Report* proposes to meet the case under consideration, by providing that after answer, any party or person interested, may apply *summarily* for such a decree as shall appear to be ultimately necessary on the face of the pleadings; and that the Court may by *interlocutory order*, on *motion* by any party, direct any inquiry, so that the Master's report may come on to be heard at the same



time with the other matters in issue. But Mr. Russell's suggestion goes much further, the early hearing he recommends would be compulsory on the parties; that, it is possible, may not be convenient, but is there any objection to allowing either party to set down the cause for such hearing? and in aid of the same principle, my proposition would be, that the pleadings should, in every cause, immediately on their conclusion, be submitted to *judicial preparation*, thus pointing out the propriety, where such might exist, of that early hearing or interlocutory judgment, which the Commissioners by their propositions recommend. At the same time, such a judicial summary of the pleadings would form a document, which might much facilitate the proceedings before the Master, become the groundwork for the examination of witnesses, assist in drawing up the decree, and offer a summary of the cause by way of case, in the event of an appeal.

## CHAPTER XI.

### *Equity Practice.*

#### *Examination of Witnesses.*

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THE inquiry is now arrived at that stage of the suit, where the plaintiff having obtained the discovery he seeks, and the defendant having had an opportunity also of interrogating the plaintiff as far as he may have found necessary to his case, the pleadings are concluded, and each party is entitled to go to proof upon the facts they may have severally alledged. The mode of taking that evidence so as to put the judge in possession of the whole merits, as far as facts are concerned, in a way satisfactory to the Court and to the parties, is obviously a matter of the first importance. If the interests at stake in Courts of Equity demand the best and most satisfactory mode of trial; if it be material that facts upon which the issue of a cause depends should be presented to the judge in a way to satisfy the con-

science of the Court, and to obtain the acquiescence of the parties ; in short, if causes are to be decided upon evidence, surely it must want but little of argument in support of the proposition, that such evidence ought to be the best, which the nature of the case will admit.

The whole of the evidence in Equity causes is taken *in secret*, excluding the presence of the parties, upon written interrogatories, exhibited before the witness is produced. Upon petition, in bankruptcy, and in all summary proceedings, the Evidence is by voluntary affidavit. In causes, the credit of the witness can be tried only by a cross examination, conducted upon interrogatories prepared without any knowledge of the evidence in chief. In summary proceedings, the matters of an affidavit can be met only by counter affidavits.

The great question for consideration is, whether this be a satisfactory mode of getting at the truth ? and that is the only question ; because if it be not, no argument for the continuance of the practice, derived from any supposed inconvenience in reforming it, ought to be of the least avail. With the greatest deference to those high authorities by which this mode of examination is defended, I am firmly persuaded that the public will be convinced that it is not either the most effectual or the



most convenient mode of obtaining the truth, and therefore that it ought not to be suffered to continue.

The only remedy proposed by the Report for the imperfections which the Commissioners admit, is the substitution of permanent examiners to travel into the Country, instead of those by the present practice appointed by the parties, and some very minor regulations as to the mode of taking down the evidence. The imperfections are admitted, and when nothing but a complete alteration can cure the evil, such partial amendments will only serve to perpetuate the grievance. It seems to be apprehended, that taking the evidence *viva voce*, is either in itself impracticable, or that such a reform would introduce some fearful innovation in the constitution of the Court. But it may be, that we shall be convinced that the practice originated in an erroneous view of the sound principles of justice; and that the existing mode of proceeding is more practically inconvenient, than that which is proposed to be substituted.

It may be useful to inquire, how secret examination was originally introduced. There is little doubt, but that in the Roman Courts, witnesses were examined *viva voce* in public; it is impossible on any other supposition to

understand the rules laid down for their orators in cross examination; and Heineccius attributes the existing practice of requiring the parties to be present at the *production* of the witnesses, and not at their *examination*, to an erroneous construction of the text of the civil law; the judge was certainly always understood to be in possession, not only of the matter of the evidence, but the manner in which it was given; and it is impossible to believe that justice can generally have been administered in any civilized nation, upon any other principle. It would be to no purpose more minutely to inquire, how and when the practice was introduced into our Courts of Equity, and of Ecclesiastical jurisdiction; it may be sufficient to know that secret examination is no more authorised by the best European Codes, than it is borne out by principle. In France the witnesses are examined separately, but in the presence of the parties; and in Scotland the parties and witnesses are subject to cross examination, as they would be in our Courts of Law; in both Countries the examinations are in general taken before the judge, but in many instances are taken before Commissioners, and reported in writing to the Court.

To examine more closely the evils arising

from the present system, and the benefits of viva voce examination; it is necessary to consider the nature of Equity pleadings, and the subjects to which the evidence there applies. It may be true that a large proportion of Equity jurisdiction is founded on written documents; but it is equally clear, that very much of the subject matter there to be examined, peculiarly requires the very best mode of eliciting the truth; and that, not in the shape of an issue submitted to the verdict of a jury, but in such a form, as when presented for the deliberate decision of the judge, is most calculated to produce satisfaction to his own conscience and to the parties.

Is the question whether a legal agreement exists, founded on a verbal compact?—is the consideration of a promise the question in dispute,—is fraud or circumvention alleged,—is a secret trust to be sifted,—is notice the point at issue,—is a right of tithes in litigation,—or are any of those various inquiries into facts which occur in the course of equitable investigation, to be followed up? How is it possible that the examination of witnesses upon written interrogation, without the presence of any person that knows any thing of the circumstances, can be attended with a



satisfactory result ? The Commissioners are satisfied that the instances are rare in which any suspicion can attach of ultimate injustice, in consequence of the existing mode of taking evidence ;— but that is a very narrow way of viewing the question: the point is not whether the judge, according to what he sees returned to him as evidence, is satisfied that he is in possession of the full merits of the case (however difficult I may find it to reconcile to my own notions the opinion of the Commissioners even to that extent) but whether the parties are satisfied that the Judge is in possession of the merits ; and there is more of evil arising from this source, than perhaps judges are in the exact situation readily to apprehend.

It is not solely upon the principle of arriving at the truth, unassailable as that position is, that I would rest the argument for viva voce examination. One of the most important principles desirable in Equity proceedings is *publicity*; one great evil the public feel is, a sort of mystery which involves these suits, often keeping out of sight during their progress the real merits of the cause, so that ultimately when it comes for decision, the original occasion of the litigation is forgotten, the original parties concerned are gone, and

it is at last discovered that the real point at issue, had it been understood in the outset, would have been long ago amicably settled. This want of publicity leaves no place for the operation of public feeling, it admits no discussion which might lead the litigants to a more just view of the real merits of their case, it keeps the parties themselves from that knowledge of the proceedings which would enable them to go straight forward to the object in view, and it so far keeps out of public sight the whole machinery, as much to have contributed to the exposing the constitution of the Court to those exaggerated animadversions of which it has been the subject.

However much the technical forms of our Courts of Law may be fairly the object of censure, yet the people acknowledge that substantial justice is *there* speedily administered; the examination of the merits takes place at home, but in Equity practice, the pleadings and evidence at no period come before the parties, in any complete intelligible shape. The parties may be satisfied in the end, that the matter has undergone the most patient investigation by the judge, and that the decision is grounded upon the soundest principles of law,—there is no reason why they should



not also have the advantage of better understanding the progress of the suit, of meeting the difficulties as they occur, of watching the conduct of their agents, of entering into direct discussions and arrangements, and at all events becoming better prepared for the probable event of the cause. In this sense the whole course of Equity practice is at present secret ; the pleadings are of that complicated form that they are never presented to the parties in a shape to be understood, and from any participation in the essential inquiry into matters of fact the party is positively excluded. Where knavery or fraud, interest or obstinacy, prolong the suit, publicity would lay it open to reprobation and defeat.

The principle of *viva voce* examination is not perhaps seriously controverted ; but it is said that it cannot be adopted without more of delay, expence and inconvenience to the parties, than under the present system. If then it can be shewn that delay, expence, and inconvenience would probably be avoided by a plan for *viva voce* examination, the experiment at least ought to be tried. The great expence of examining witnesses is in journies and maintenance of witnesses, and the time of the solicitors and examiners ; now if Courts for examination were provided in London and



in all the principal districts in the country, partly permanently resident, and partly by means of periodical circuits; if those Courts consisted of persons competent by their weight and authority to conduct examinations with dispatch, and if thus all the witnesses could be produced and the examinations concluded at one time, subject always to further examinations by direction of the Court, it is difficult to perceive how either the delay, expence, or inconvenience of such a course would be greater than at present, where every witness must either be produced in London, or there must be a special commission for examination in the country.

But the grounds for preferring public examination do not rest here. Equity pleadings are not calculated to reduce the matters in question to any very precise points; each party is at liberty to give evidence in any way relevant to his case; for this purpose a set of interrogatories is prepared by counsel, applied to what he considers ought to be proved, with little reference to the circumstances of the persons who are to be produced to prove it. The witnesses are then placed before the examiner, who is tied down to his interrogatory, and at present is either a person named by the party, or a public

examiner without any local knowledge whatever; the witness gives his answer just as far as he pleases to give it, and no farther, either incomplete from ignorance, evasive from design, or argumentative from partiality, as may happen to fall in with the circumstances in which he is placed, and which nothing short of a public examination can possibly controul.

It stands on the evidence of one of the examiners, that frequently all the interrogatories being found inapplicable to what the witness has to say, it is brought out by accident under the sweeping interrogatory at the end, "whether he knows of any thing beneficial to the party on whose behalf he appears;" and in answer to which the examiner hitherto has had no authority to reject any thing the witness has chosen to have set down.

Then comes the cross examination, as to which, although it may be true that the mode of examination often indiscriminately applied at the Assizes, is not a practice to be imitated; yet if cross examination be of any use at all, the idea of obtaining any beneficial effect from it in the present mode, is literally absurd. It is justly observed by Mr. Shadwell, that upon the present plan you may be morally sure that you have *not* got upon the deposition, the answer which the witness gives;—and it can



only be necessary for a moment to consider that no question can be asked arising out of what the witness has said, to see at once that the whole course of examination upon written interrogatories by the one party or the other, so far from necessarily producing a conviction that the truth has been obtained, is rather calculated to instil the conviction, that the deposition does not represent to the judge, either what the witness meant to say, or could have said upon the subject.

Simplicity is the beauty of all legal proceedings; the parties having concluded their pleadings, a time and place should be assigned for each producing his proofs, to be examined before a judge in their presence, and cross examined at their pleasure; this is a course which all the world would understand, and would at once infuse an activity and interest into the cause which in vain you may endeavour to awaken, by any other alteration of practice whatever; there would be no difficulty in adopting such a course in all examinations both in Courts of Equity and Ecclesiastical Courts, and in following out the same principle in bankruptcy, and in every inquiry in all sorts of suits of proceedings in every Court in the kingdom. The parties ought to be left at liberty up to the very moment of proof and



during the examination, of producing any and every species of evidence they may think best; there is only wanting a judge to confine the matter of proof to the facts at issue, to decide on questions of competency, and to restrict the examinations to what may be evidence according to the sound rules of law. The course which Courts of Equity have found it necessary to adopt, in order to admit objections to the competency of witnesses, and even to their credibility, after publication, is the most inconvenient imaginable; for supposing a deposition to be not within the rules of evidence, or the witness to be open to objections to his competency, the only course is to suppress the deposition altogether, and the party is deprived of giving other evidence to the same point; or perhaps if these defects in the depositions are not discovered, the cause may be left to depend on evidence which, had the examination been properly conducted, would never have been admitted. I find in the evidence the following question and answer—  
“In point of fact, in your experience, have you  
“found that a great deal of trash comes out  
“in the shape of evidence from the Examiner’s  
“Office?—A monstrous quantity; so that  
“it is almost the practice to read a great deal  
“of stuff straight forward, and then leave

"it to the Judge to reject a great deal of it  
 "as it occurs."—I will not endeavour to add  
 to the force of this observation; but we may  
 just notice in passing, that all this *trash* and  
*stuff* is to be office copied, and recopied,  
 into the briefs, and forms part of all the sub-  
 sequent proceedings.

What is the advantage of secrecy? — That  
 one witness shall not learn his lesson from  
 another, or perhaps it may be, that the witness  
 shall not be intimidated by the party, or  
 that a party shall not bolster up a weak case.  
 — Now as to the first point, the witness is not  
 in fact prevented from immediately telling the  
 whole to the party, and to other unexamined  
 witnesses; the persons excluded from being  
 privy to the examination are the parties, the  
 only persons whose presence at that time  
 could be useful; and the only persons whom  
 there could be any pretence to exclude from a  
 knowledge of what is sworn, the other un-  
 examined witnesses, are not excluded. As  
 to intimidation, the time is gone by, when  
 that could be any subject of apprehension;  
 and unless the testimony is to remain a secret  
 for ever, it has no application. With regard  
 to the bolstering up a case; what is the intent  
 of evidence but an opportunity to the party  
 to prove his allegations? You now encourage,



may force him to tutor his witnesses by this very secrecy, and by depriving him of the means of asking the questions he would desire, (for the interrogatories drawn by his counsel cannot in common sense be esteemed to be such) and you cause the production of perhaps ten, to prove what one, if submitted to a fair open examination, would have satisfactorily established. If there be any force in this objection to public examination, it applies to our boasted trial by Jury, and to the practice of all Courts of general jurisdiction in the jurisprudence of all modern Nations.

The Commissioners observe, that the Judge who decides the cause could never have the benefit of an oral examination, by observation of the demeanour and conduct of the witness, unless he was to take all examinations in person; so that, either the Court of Chancery must be perpetually going the circuits of the Country, or the witnesses be brought to London;—that if evidence were taken *viva voce*, no Judge might be present of sufficient authority to controul the examination, and that in cases of doubt recourse must still be had to a trial by Jury; adding, that the existing plan has this advantage, that it preserves and records the evidence.

Now evidence might be equally well re-



corded, under a public as under a private examination ; it is so done in France and Scotland ; it is done before committees of the House of Commons, before Commissioners of bankrupts ; and so far from there being any additional difficulty in recording the evidence when taken before a competent judge in a public Court, I am confident the compressed mode in which evidence would then be given, would give a great facility in reducing it to a written record ; and the bulk would be reduced, and not increased, for besides the improved compression in form, the number of witnesses would probably be much lessened, because a party instead of loading the case, as he now does, with all the witnesses he can collect, upon every circumstance he has to prove, would never run the hazard of producing a single unnecessary witness upon any point.

With respect to the relying, as a general rule, on ultimate resort to a jury upon all disputed facts ; it would be a course much more subversive of the whole constitution of Equity jurisdiction, than any possible alteration in the mode of taking evidence. It is not agreeable to the constitution of equitable jurisdiction, that any fact should be submitted to a jury, which is not necessarily of itself fit to be heard *and decided* before

such a tribunal; an issue must always be attended with this inconvenience, that mixed up as it must be of matter of law and fact, the law is to be pronounced by a judge who has not the whole case before him, neither judge or jury feel the proper interest and responsibility in the decision, and the ultimate judgment both upon law and fact comes to be decided by the conscience of the Equity judge, often more fettered than assisted by the verdict. The Court has often decided against the verdict, and if therefore the testimony could be presented to the Court in its true bearings, the verdict of the jury if not conclusive, would be an useless and inconvenient appendage. Trial by jury has been carried to its utmost extent, and any idea of submitting all controverted facts in Equity to that tribunal would indeed be an utter subversion of the Court.

Practically then, what is the best mode of taking the evidence, for that ought to be the only question. It ought to be taken before a judge, of sufficient weight and authority to controul the examination. It has been already proposed to appoint Masters resident in different districts; it probably will be part of a necessary reform in the higher judicial department to introduce more judges



in all the Courts of superior jurisdiction. It matters not for our present purpose whether a judge be added to a Court of Law or Court of Equity; either will be proper for aiding in the necessary establishment for taking evidence publicly in Equity. It probably would be found convenient to work such a plan, partly by a resident judge in the situation of a Master, and through the Masters in London, and partly by means of Circuits by a judge of one of the superior Courts. There can be little doubt but that it will prove ultimately desirable to incorporate the Welsh jurisdiction with that of England; and if in connection with such a plan, a single judge for instance were added to each of the superior Courts, there would be the means of arranging circuits, so as to include not only the taking of Equity causes, but the efficient and certain dispatch of the law business at the Assizes, and thereby removing what at present is a great public grievance, the arrears frequently occurring in the civil business at the Assizes. The needless expences, which are often incurred by parties in consequence of remanets left at the Assizes, have become a burthen to the subject to no inconsiderable extent. It is a matter demanding the earnest attention of the Legislature, for it is not fitting that the people



of England should ever have any reasonable ground of complaint, that justice is not expeditiously and effectually administered.

The benefit of conducting Equity examinations before judges at the Assizes would partly consist in the facility of assistance of Counsel, and the convenience of attendance of solicitors and witnesses, besides the additional weight attached to evidence so taken; but there would be no necessity for confining the taking of evidence to such a tribunal, and the establishment of Masters in the Country would offer a permanent tribunal for the taking of Evidence at any time.

We may be told of the expence of such trials at assizes, but arrangements might easily be made to prevent more business being taken than could conveniently be expedited, and then there could be no other plan so cheap and expeditious. Either party would be at liberty to appoint an examination subject to the superintending controul of the Master. If the inquiry were desirable in different parts of the Country, there would be no objection to this being, by leave of the Court, permitted; taking care to prevent its operating vexatiously to the other party, by making it conditional on payment of the costs of cross-examination where justice should so require. The time and place of

taking such examinations ought to be settled by the Master to whom the cause is ascribed, after hearing the parties; and the Master should limit a time within which all the examinations should be concluded, at the expiration of which, on default of the plaintiff, the cause would stand dismissed, and on default of the defendant, the plaintiff be entitled to a decree.

The authority which has made me the most hesitate in my own opinion, is that of the present Master of the Rolls, who in his speech on introducing this subject to parliament, expresses his conviction that the plan of public examination is not only impracticable, but not desirable; as I cannot from the reports collect the grounds of this opinion, I can only submit the point to public to decision.

There is another point of view, in which a public examination is superior to a secret one; as a privilege to the witness. - It is a very dangerous discretion, merely in reference to the witness himself, to permit a secret record of a secret examination. In short, I can discover no possible good of secrecy, but that of preventing the party seeing his way in the conduct of his own case. With respect to issues, besides the utter inconsistency of submitting the matter to the jury at one time and place, and to the judge at another, to decide the same

question, there is this inconvenience, that no issue can be had, until after the witnesses have been examined, and their depositions published; so that the Court which has been so jealous of bolstering up a case, as to debar the party, producing a witness, from a knowledge of what his former witness may have deposed, sends the parties to try the same point over again, with the deposition of every witness published for the guide of that witness on his subsequent examination.

I trust that enough has been said to induce the Legislature to enter upon this point of the inquiry, under a conviction that it is of that importance imperatively to demand their interference; the arguments in favour of public examination have, in the limits of this inquiry, been necessarily very imperfectly detailed; if enough has been said to make out a case for further consideration, I feel no doubt that upon investigation every argument will come out stronger than it may at first appear; if the subject be not thought to deserve that consideration, then all further discussion will be superfluous.



## CHAPTER XII.

### *Equity Practices.*

*Conclusion of the Cause — Injunctions —  
Decrees — Appeals — Costs.*

Numerous are the points in the Report, of which the limits of this Inquiry will not admit any beneficial discussion; my object has been rather to take a general view of the subject, and to endeavour to fix public attention to the necessity of some effectual reform, than to attempt the discussion in detail of every matter admitting observation or controversy. The public will look more to the principles of the propositions, than their technical effects, and although in general the regulations introduced go to accelerate the cause, and facilitate the objects of the suit, they in many important points appear to me to stop short of effectual revision and reform. The points that remain hardly admit of any connected arrangement.

First in regard to *Injunctions*; the power of a Court of Equity in restraining proceedings at law is so very large; the power is so frequently used for oppressive and vexatious purposes; and the present practice is so directly open to abuse; that I cannot but feel disappointment at the very insufficient restraints which the report proposes to impose. It is sufficient for the public to know, that by the present practice a plaintiff on filing his bill, asserting that it is necessary for his equitable relief that proceedings at law should be stayed, obtains an injunction for that purpose as *of course*; the opportunity supposed to be given to the defendant of preventing it, by putting in his answer within a limited period, is from the inadequate time allowed merely delusive, a mere race tending to no object, because after all, the validity of the injunction must still be regarded as a question to be decided upon the merits at some future stage. It appears then to be the most simple proceeding, not to permit the plaintiff to claim his injunction, except upon shewing merits in the first instance; he ought to be entitled to a speedy hearing, but it should be on notice to the other party; subject only to an injunction going in special cases upon urgent cause without notice, to stand till the further hearing. It is

difficult to understand how a plaintiff, having a fair case, could be prejudiced by such a course, but it is easy to comprehend, how against a defendant the obtaining an injunction without notice, and without merits shewn, may be made the engine of the grossest oppression ; and instances of that sort are mentioned in the evidence, too strong to be with fairness here detailed, without more of explanation than time will allow. The only remedy suggested by the report is, that the bill shall be accompanied by the affidavit of the plaintiff *and his solicitor*, that the bill is not filed for delay ; I have already given my reasons for protesting altogether against such a kind of affidavit by the party, and much more so by his solicitor ; and as to its being any effectual bar to the abuse of the system, such a course may serve rather to encumber the fair case, and to give colour to a fictitious one ; indeed I do not readily understand how a party filing a bill to restrain legal proceedings, can with propriety swear that the bill is not filed for delay ; and if the plaintiff is to be held to any affidavit at all, what is to prevent his bringing forward at once a case sufficient to entitle him to that protection which he claims ?

The course of the inquiry now leads to that point, about which perhaps public interest



has been the most intensely excited, the *Judicial Constitution of the Court*, as regards its efficiency to the dispatch of the public business. If I have felt diffidence in many parts of this discussion, on no point am I conscious of more difficulty in arriving at a satisfactory conclusion, than on this; but so far is clear, that unless the arrears of business in the Court of Chancery be overcome, and future accumulation prevented, it is impossible to give a fair trial to any of the regulations that are proposed; it is impossible to give reasonable satisfaction to the country at large. Upon this point the evidence is uniform, strong and conclusive; one of the witnesses justly observes that any accumulation of causes is a disgrace, not to the judge but to the constitution of the Court; a cause now set down before the Vice-Chancellor, would not probably be heard for eighteen months, and before the Chancellor for two or three years; and it is not to be expected that solicitors will work up with any effect, with any spirit or energy, to such a termination of their labour.

The remedy proposed by the Commissioners is, first—as to *Bankruptcy*, to erect a *new Court*, to be composed of ten select Commissioners, to take appeals from the Commissioners sitting under the several London Commissions; the

Court to proceed by viva voce evidence, to be recorded ; and to be subject to appeal to the Chancellor, except in matters under the value of fifty pounds. This Court would be confined to matters *appealed* from the London Commissioners leaving all direct petitions in bankruptcy, being much the largest proportion of the business, for hearing before the Court as at present. The objections to this plan appear to be, that it will not sufficiently relieve the Chancery Court, and that ten judges holding temporary dependent appointments, and having mere occasional judicial employment, may not be the most efficient and satisfactory Forum for such business. Are there not already far too many Commissioners of Bankrupt for the purposes of uniformity and weight in decision, or for convenience in dispatching the business? Certainly, the bulk of the evidence goes fully to establish the affirmative of that proposition. Would not one Commissioner constantly engaged in Bankrupt business, dispatch the business of each commission with more ease and satisfaction to himself and to the parties, than a list of five, of whom it is sufficient any three be present, whether those who have commenced the business or not, and who may be transacting the business of two or three commissions



or more at one time? Is it not a more sensible plan to endeavour to place the actual execution of the commission on some more efficient footing, and then to have one appeal only to the Judge, who is to decide finally without the intervention of the proposed new Court.

It would be easy, by reducing the number of Commissioners and their devoting more time to the business, and by appointing country commissions to be executed only by select Commissioners, much to improve the present machinery, and ultimately avoid the separation of this jurisdiction from Chancery, — a result which by many of most experience at the bar is justly deprecated. There are indeed many weighty reasons why the supreme jurisdiction in Bankruptcy ought not to be separated from the office of Lord Chancellor. It is perhaps sufficient to say that it is a jurisdiction without appeal, involving unlimited powers over the person and property of the subject. The union of this jurisdiction with Chancery might be preserved, by appointing another judge with similar powers to those of the Vice Chancellor, and with much less expense to the country than by the establishment of an independent Court, and thus the further splitting of jurisdictions be avoided;



a system which, in all probability, would in its consequences prove highly detrimental to the general character of the English Bar, and to the invaluable judicial establishments of the Country.

The true principle in arranging Courts of Equitable jurisdiction is, that to preserve the eminence and authority of the Court, the judges should be confined in number to the smallest possible, capable of dispatching the business; and to preserve independence and individual responsibility, that *one* judge only should form the Court. It is impossible to decide with advantage on the best judicial arrangement in Chancery, without adverting to the constitution of the Court of Exchequer. It is said that the inefficiency of that Court, as a Court of Equity, much arises from the interruption by the Chief Baron going the circuit, and his attending to the law business of the Court; if such be the cause, the evil seems to admit of easy remedy;—excuse the Chief Baron from the circuit, who might then take all the Equity business, and his attendance in the Court of Law be confined to very special occasions. Whatever be the cause, it would be useful that this ancient Court should be rendered in every respect efficient to the public service. Dissimilarity of forms in Courts of

that jurisdiction, there will be little doubt of its being in principle much preferable. Again in the working of bankruptcy commissions, improvements might be introduced, which would give more of public satisfaction, and create more uniformity and weight in decision, and thus much of the time of the superior Court be saved. If a little more of *military* movement would improve the march of a suit in Equity ; we want in bankruptcy proceedings, and in all matters of legal investigation connected with accounts, something more of *mercantile* precision, dispatch, simplicity, and well directed liberality, in the transaction. What necessity is there either for the form of the Commission or Assignment of effects, when a publication of the names of the Commissioners, and of the Assignees in the Gazette, would answer every object ; the retaining of useless forms, for the purpose of fees, is very bad political economy, and if it were thought just to attach part of the judicial expences to the parties, it might with more advantage be done by a poundage on the estate, a plan which would draw with it a public register of all such transactions, capable perhaps of being made ultimately useful in various ways. The intent evident in all the late



regulations, of preferring Town to Country commissions is not good policy ; if there be any matter of judicial interference, more peculiarly proper to be dispersed effectually into the country, it is that of Bankruptcy. The general system of bankruptcy, as a just and equitable arrangement, is excellent, and it might efficiently in a legal point of view, and beneficially for the public, be put into active operation throughout every district of the kingdom. It is a system which if rendered more extensively practicable, more applicable to small estates, might supersede the separate machinery of the Insolvent Debtor Law, assist in commercial arrangements of every description, and might ultimately lead to another most desirable object, the abolition of imprisonment for debt, a practice which had it been in fact attended with the abuses to which it is open, could never have so long subsisted under any liberal system of jurisprudence. It is due to the character of this country, to place the law and administration of bankruptcy on the most perfect footing which can be devised.

That a case is made out for interference in the general arrangement of the execution of bankruptcy process, there can be no doubt. The number of Bankruptcies has in



some years exceeded 2000, probably on an average 1500, of which perhaps half are executed in London. There are in London 70 standing Commissioners at an expence of Twenty thousand pounds a year, to which is to be added a similar sum for Country Commissioners ; the whole expence of executing commissions throughout the Kingdom every year, at two hundred and forty thousand pounds, or something above £150 for each commission. This calculation includes an average for losses by bad management, but nothing for litigation ; there will be little hesitation in admitting that the costs attending a commission, one with another, is from £150 to £200, a fact calculated to induce a conviction that some better arrangement might be adopted. The mode of submitting the estate to the management of assignees chosen by the creditors cannot be improved ; the system only wants a more direct and active Court to dictate the Law, and decide promptly all legal questions, acting, as the proposed new Court is to act, upon viva voce evidence recorded, subject to appeal, and with liberty to state cases for the opinion and direction of a superior Court. The superior Court wants to be relieved from the burthen of examining conflicting testimony upon affidavit, which

an efficient working Court in London, and improved Commissioners in the country, might entirely undertake. All the Commissioners of Bankrupt concur in representing the practice under the present system to be full of inconvenience, and calculated to throw disrepute on the judicial establishments of the country. One mode of improving the working of the bankruptcy system in the country might with great advantage be effected, by connecting it with the proposed scheme of new modelling the administration of the County Courts, a part of our judicial establishment which well deserves the best attention. An improved system in those Courts might very materially prevent abuses both in the bankrupt and insolvent departments; it would act in concert and unison with the former, and might be made entirely to supersede the latter.

We have in every County the *Sheriff's Court* for recovery of debts founded on those antient customs to which we are naturally attached, and where the merits are submitted to trial by jury. These Courts want only so much legislative assistance as may ensure their being conducted with uniformity of principle, and practical efficiency to their object, so as to render them subservient to all that we could desire, as to the speedy recovery of



debt, and thereby very much relieve the superior Courts in the administration of that part of law. Neither the plan originally proposed in the bill introduced into the last Parliament for this purpose, nor the arrangement adopted in that which passed the House of Commons, appear to have been well calculated to effect the object in contemplation. In the first place we should understand, that the County Court may at present, under a particular form of writ, demandable at pleasure by the party, hold jurisdiction over debt to any amount; consequently as to any practical purpose, and looking to the matter in a constitutional point of view, we may assume the Sheriff to have jurisdiction in debt and demands of that nature, over all persons within the county, to an unlimited extent; it is merely the inefficient state of the Court from disuse, probably on account of its want of power to enforce execution of its judgments, that prevents its holding out to the public every advantage of speedy justice, which they could reasonably desire. I can see no sound reason why, by arrangements for giving a permanent, competent, judicial officer to preside in this Court, by extending its powers of execution all over the kingdom, and giving it a power without writ, either unlimited, or



limited to a certain reasonable extent, (that proposed of £15 is too confined) the Court should not be made applicable to all the wants of the public. The trial in the Sheriff's Court is by jury, and in that respect much to be preferred to the trial in the Courts of Request, specially established in different local jurisdictions, where the mode of proceeding before an indefinite number of changeable irresponsible Commissioners in the middle rank of life, without the least reference to attainments fitted to such a situation, is open to more abuse than could ever exist under a jury system. The fees of the Court would, if it were restored to efficiency, prove amply sufficient to maintain a competent permanent judge without any burthen to the country; the Court might be held in different parts of the county, according as convenience might require; the Court should have the power of awarding a new trial and probably of taking the opinion of a superior Court on a special verdict, but the proposed introduction of circuit judges from London, connected with the Insolvent Debtors' Court, seems to be introducing a machinery which would probably be attended with more of delay and expence than convenience.

It may not be irrelevant here to observe, that the whole of the law regulating the

*office of Sheriff* acquires revision; there is a great deal of responsibility attaching to the Sheriff which might be avoided without any disadvantage to the public, and the effect of which is to make an *honourable* office needlessly burthensome, to throw the execution of the details of the office into improper hands, and to lay it open to the imputation of extortion and oppression. The constitutional execution of the judgments of the law belong to this ancient officer; and were the establishment put upon a more permanent and uniform footing, its authority might be made usefully applicable to many parts of an improved system of judicial proceedings.

Assuming now the cause to be concluded as to pleadings and evidence, the object is that it should be speedily submitted to judicial decision, in a mode readily to receive the best assistance of counsel, and the easy application of the mind of the judge. At present the great length of the pleadings, and the more enormous waste of paper in the written evidence, renders it difficult for either the counsel or the Court to become sufficiently masters of the merits of the case within the time allotted for the discussion; new regulations may introduce improvements both in the pleadings and evidence, but still there will be wanting some

more practical mode of bringing out the case in a clear point of view; the mode which has been suggested of an abstract of the pleadings by the master, with a copy of the evidence in that more compressed form which I trust would be introduced, might be found useful for this purpose, and in many cases might with great advantage be printed.

A prominent evil at the hearing, is the want of attendance of leading Counsel, occasioned by the contemporaneous sittings of the Courts. If there were always Courts sufficient to dispatch the business, and the parties obliged to go on with their causes in rotation, convenience would soon adapt the attendance of counsel to the actual practice, as few parties would on that account voluntarily submit to postponement; and if the sitting of the Master of the Rolls in the evening only, is adopted merely for the convenience of counsel, and his sitting in the morning would materially expedite business, it is a plan which there should be no hesitation in pursuing.

The dictation of the *decree* of the Court, and the mode in which it is taken down and recorded by the *registrar*, has undergone the attentive consideration of the Commissioners; the author of the Considerations strongly recommends the reverting to the old practice of



the Court, carefully dictating to the registrar accurate minutes of every decree and order, as calculated to save that very considerable inconvenience, which now frequently arises from applications long after the decree is pronounced to alter and correct the minutes, from some supposed misapprehension of the decision of the Court. The Commissioners have not adopted any express regulation to this effect, but of course it will be in the discretion of the Court to adopt it; and there are several propositions in the report, having for their object improvements in the important office of registrar.

The matter of *Costs* is one of the first importance, in regard to the practical administration of the law in every department; and the consideration of it ought not to be confined to matters of Equity practice. The rule proposed in the Report, that all costs in Equity shall be taxed upon the principle of allowing to the Solicitor, as against the adverse party, the whole costs which the Court would allow to him as against his own client, is one which, if just, ought to be adopted also in suits at Law, and in every department of legal proceedings. That it is just there is no doubt; all costs which have not unnecessarily or unreasonably been incurred, ought, where costs are given, to be paid by the party intended to be saddled

with the burthen of them. It is difficult to see in its full extent the benefits to arise from such a regulation, provided the tribunal for taxation of the costs were effectually worked, to the mutual satisfaction of the profession and the public. That the present mode of taxing costs, both at Law and in Equity, is highly unsatisfactory, is clearly made out by the evidence; the duty of taxation is proposed to be transferred from the Masters to the Six Clerks in Chancery. There are many reasons for relieving the Masters from this duty: the Master's knowledge of the circumstances of each particular case, particularly when invested with his new power of active interference, however good in guiding his discretion in awarding costs, is not calculated to fit him for the details of settling the solicitor's bill, with due regard to the maintenance of his judicial authority. But the transferring the tribunal to the Six Clerks' office, is not well calculated for that general superintendence, that efficient and satisfactory controul, over legal costs in all departments, and on all occasions, which we stand in need of. The Author of the Considerations concurs in the opinion generally expressed in the evidence, "that it will be desirable to create an office for the taxation of costs, generally consisting of



“persons who may be fully qualified to judge of  
 “the propriety of all bills of costs in matters  
 “of law of every description, that is, of the  
 “bills of attornies and solicitors, whether in  
 “causes or in any other business transacted by  
 “them for their clients, including convey-  
 “ancing business.”—I am confident that the  
 profession at large would consider such an  
 establishment as one of their best privileges,  
 and that if effectually put into operation  
 throughout the country, it would prove bene-  
 ficial to the public to an extent equal to  
 the most sanguine expectation; but in order  
 that the plan may be fairly tried, such a tri-  
 bunal requires to be first placed on the most  
 efficient footing in London, and then to be  
 connected with the duties of resident Masters  
 in the country, or some other local authorities;  
 through which all local information and ex-  
 planation may be readily and satisfactorily  
 obtained.

The report concludes with the subject of  
*Appeals*. The propositions give exclusively  
 to the Master of the Rolls and the Vice-  
 Chancellor, the final decision on appeals from  
 the Master in matters of pleading; and  
 exclude the parties from the double stage  
 of appeal to the Chancellor, and from him to  
 the House of Lords, leaving it to the option



of the party to appeal to the one or the other; and they propose to limit the time of appeal, and of rehearing, before the same judge; the former to six months, and the latter to one year, after the decree or order pronounced. There is no limit proposed for appeals to the House of Lords. Now if it be agreeable to the constitution to exclude an appeal to the House of Lords altogether, a course which there is not apparently on the evidence sufficient reason for adopting, there can be no ground on that score, against limiting the time of appeal to the House of Lords in all cases; the period of such appeal appears to be limited in the Act for regulating Scotch proceedings, and it is not obvious why this privilege should be left unlimited in England, which in effect I apprehend it to be, without an enormous expence in enrolling the decree. How far the proposition of directly barring an appeal to the Lord Chancellor, in any instance of a decree by the other judges of the Court, and of indirectly excluding the benefit of such an appeal, by preventing a further appeal to the House of Lords, will prove of any sufficient advantage to the Country, to justify the hazard of thereby lessening the high authority of the office of Chancellor,

is matter that deserves full consideration before it be adopted.

Such then are the evils existing in the practice of our Courts of Equitable Jurisdiction, and such the remedies proposed. Firmly persuaded that the system itself is calculated to maintain the liberties of the people, to secure their property, to advance their happiness, and exalt the character of the country, I leave it as a subject fitting the deliberative wisdom of the British Legislature. The details must be technical, the subject altogether may meet with less general interest than it deserves, but to a Government it must be plain, that the satisfactory administration of Justice, is one of its best safeguards, and its brightest ornaments.

The fact is, that the whole system of our Law is passing through the ordeal of public opinion, and thereby undergoing the best sort of general reform and revision. Heaven grant that it may be so reformed, and so defended, as to ensure the blessings of a free Constitution to the latest posterity.

## CHAPTER XIII.

### *Real Property.*

#### *Introductory Observations.*

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WE are relieved from the labour of any consideration of the necessity of a *Revision of the Law of Conveyancing*, by the express recommendation in the report, founded as that recommendation is, on a principle none will controvert,—that the many subtleties and niceties of this branch of the law become an endless source of litigation.

There are few whose lot it may not have been, to have had occasion to feel and lament, that land is not invested with that facility of transfer which the habits of mankind require; and the nearer we approach the subject, the better shall we be convinced, that there is nothing so essential in principle, in many of the complicated parts of the existing practice, as to forbid an attempt to reduce them to a more simple and intelligible form.



The discussion has been commenced by Mr. Humphreys, in a work worthy to stand foremost in such a controversy; and he has ventured at once on the outlines of a *New Code*. For reasons opened in the early part of this Inquiry, I am persuaded that the public will prefer a revision upon a very different principle. The ground taken in proposing a new Code appears to be this, — that the fundamental doctrines of *Real Property* have led to so much of inconvenient complication, as to make it necessary that the intire system should be abrogated, and an intire new law substituted. The principle which I should rather advocate is, that however antiquated are the maxims upon which the system is built, however complicated the forms it has introduced, and however necessary that they should give place to something more direct and simple; the essential qualities of real property, settled and established in all material points, by the course of events and the current of public opinion, and being in fact agreeable to the spirit of the English Constitution, ought to be inviolably preserved.

It is impossible, within the limits which in this Inquiry I have prescribed to myself, to enter into a critical examination of all the particular points, in which revision and reform

may appear to be called for ; and as it is to the Public these considerations are addressed, it may be more practically useful to attempt rather some general exposition of the actual state of the law, and of the mode in which that reform may be most safely effected.

The great line of distinction between the Law of England, and the codes of most European continental nations, in regard to land is this,—that in the European codes, founded as they are on the *Civil Law*, property is divided into moveable and immoveable, each of which has its peculiar rules of possession and use, but as far as regards the title by which it is enjoyed, the forms by which it is transferred, or the rules by which it is transmitted to successors, there is no essential difference between the one species of property and the other ; whilst in the Law of England, founded as it is, in regard to land, on the *Feudal Law*, land is treated as a species of property totally distinct from moveables, and is governed as to all its qualities, in its use, and its dominion, in transfer, in transmission to heirs, in attachment by creditors, and in title in every way, by rules and maxims built on its own peculiar foundation, and applicable solely to its peculiar character.

Now however desirable in theory it may



appear, to place all property under one law of enjoyment and transmission ; such a proposition is not one which the constitution of England can with safety permit to be agitated. The soil of England is imprinted with its peculiar character, by the Law of England ; its leading marks of distinction spring from recollections, coeval with our existence as a free people ; and are much too intimately interwoven with all that is dear to us in history, and valuable in our national character, to be exchanged for any Theory under any authority whatever.

The essential principles of the Law of England in regard to real property ; the extent of dominion, the power of settling it in one family for a limited period, the free disposition of it by will, the unlimited power of disposition over every interest attaching to it, the rights incident to it in regard to the civil relations of life ; the power of dealing beneficially with its use in the relation of landlord and tenant, the facility of moulding interests in it, to meet the wants of the possessor, and of making it a security for debts or charges ; the privileges attaching to large possessions, with the ready means of dividing it into the smallest parcels ; are all qualities desirable to be preserved, not only because



they are the law, and have been established by common consent, and to meet existing exigencies; but because, in their general impression, and as the foundation or outlines of a system, they are in themselves convenient, and best adapted to consolidate with the invaluable Aristocracy of the constitution, the genius of freedom, the spirit of commerce, and the liberties of the people. If we are not solicitous to put in hazard, and that without any sufficient cause, the existence of these peculiar principles, and with it the whole scheme of our Law in regard to landed possessions, and all the privileges derived from it; if we are not prepared for an intire subversion of the whole law of real property, with all its consequences, we dare not contemplate the idea, in its general and popular sense, of a new code.

Nor do the actual existing inconveniencies warrant a change so dangerous and extensive; the practical evils of which we complain may be remedied without interfering with the peculiar character of the law. Complication of form may be remedied by making forms more simple and intelligible; what is permitted indirectly, may be authorised directly; useless distinctions may give way to clear definition;

obsolete technicalities may be entirely abrogated; the limits of dominion may be made better known, the modes of transfer better understood, the rules of succession more consonant to general apprehension; and every improvement adopted which, with due regard to the stamp and character of the thing, shall tend to make property in land more beneficial to be enjoyed, more easy to be transferred, and better adapted in every way to the wants and habits of the people.

And all this may be effected, by a careful revision of the existing law; *tenures* exist, and have existed from time immemorial; their history may be traced, but their origin is not to be discovered; their consequences are not essentially inconvenient, and because forms incidental to that system, have in the lapse of ages become complicated, the people are not prepared to commence the reform by an utter *Abolition*, as Mr. Humphreys proposes, *of all tenures, and all their incidents; followed by a general Royal Commission for the enfranchisement of all copyholds, the extinction of all perpetual rents and services, and the division of all common lands; and on its return a Proclamation, fixing the period when tenures and copyholds, rents and services, and every incident*

*to such privileges shall for ever cease, and be abolished.*

I see nothing absurd or preposterous in copyholds, or perpetual rents, or rights in common; tenure is but a name, and I am persuaded that all that is good and valuable in the system, all that is congenial to the spirit of our jurisprudence, may with advantage be preserved, while all its niceties and subtleties may be swept away; gradually perhaps, but not the less effectually, or less in accordance with the general system of the Common Law. The essential principles which I would hold fast, as constituting the peculiar character and excellence of our law of real property, are, the Law of Entails, the Rule of Primogeniture in succession, Distinction from moveable property in its modes of transfer, Transmission to successors; and Attachment for debt; and its capability, by Division of Interests and Trusts, of being best rendered subservient to the general uses for which property is designed.



## CHAPTER XIV.

### *Historical Sketch of the Law of Real Property, before the Statute of Uses.*

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It is no part of my design to attempt an history of the *Feudal System*, and of the doctrine of *Tenures*, but some general view of the origin and successive variations of that part of the law is obviously necessary for a clear understanding of the subject. The inconveniencies of the existing law of real property, can not with justice be attributed to any direct operation of the doctrine of feuds, but rather to rules adopted at various intervals, for the purpose of conforming that system to existing habits, without preserving sufficient of coherence and uniformity either in legislation or judicial decision.

Among the Continental Nations, the feudal law was suffered to attach only on distinct portions of territory, such as the conqueror seized and assigned to his vassals, on condition of military service, commuted in the pro-

gress of civilization into pecuniary rents;— Feudal Property and Allodial Property existed together, the latter gradually converted into the former, until in the further progress of time the doctrine of feuds again gave way to the rules of the Civil Law; and in each country Codes were established on that foundation, mixed with those rules which the peculiar customs of the people had sanctioned. But in Britain, the system of feuds attached at the conquest, or in consequence of it, on the whole soil of the Island, the ground-work of the structure was, that the dominion of the whole was in the King, a magnificent idea for a monarchical Government, a key to all our dearest pages of history, but which has no more direct influence on the law of real property at the present day, than the name of King has on the spirit and genius of that free Constitution of which he is the head. Thus then the Feudal Code became the common Law of *England*. It soon followed in *Scotland*, and was planted by conquest in *Wales* and *Ireland*.

It is not necessary to follow the feud from its infancy to maturity, from the possession or usufruct for life, to the inheritance passing to the beneficiary and his heirs, the ultimate dominion still always residing in the superior

Lord ; and hence, the Lord's title by *Escheat*, for want of heirs or an attainder for felony ; his right to have the infant heir in *Ward* and to dispose of the ward in *Marriage* ; and to have the *seisin* or possession sued from him upon every descent or alienation. We may take the feud at its full vigour, when all the land in the kingdom was held of the king in *Capite*, by *knight service*, that is by military or honorary tenure ; except those manors which the King kept in demesne, and which to this day are termed *Antient Demesne*, where the tenants occupied under socage, or villein services ; and except the tenure of *Gavelkind*, extending generally over nearly the whole County of Kent, and some peculiar tenures in *Boroughs*, we may then follow this system to the tenures of land under these tenants in capite, those great and Lordly Barons of the land, and Princely Ecclesiastics of the day ; we may suppose the lands in every manor parcelled out to the tenants, to be held either by military service to be performed under that lord, and at his command, either personally by the tenant or his deputy, a service in course of time converted into a pecuniary rent ; or held by *socage tenure*, or the render of the produce of the plough ; or held by *villeins*, under a variety of



services, now converted into *Copyhold Tenure*, formerly held literally, and still nominally, at the will of the lord.

The lord had the same feudal privileges over his tenants, as were vested in the Crown over its proper possessions, Escheat, Wardship, and Marriage; also Primer Seisin on descent, and Fines on alienation, or a relief of a fixed money payment in lieu of it. The lord or his sub-tenant, without restriction, might make *subinfeudations* to be held of himself by any services he pleased to impose, and for any extent of interest he chose to grant; with no restriction but that imposed by Magna Carta, that he should not make such grants without reserving sufficient to answer the services to the superior lord; but this privilege was found incompatible with the restriction, and we shall presently see it soon after ceased altogether.

The distinction between tenure by knight service, and that by socage, since called free or common socage, was essential in many points; each was founded on the oath of fealty, but while the services under the former were uncertain, and the privileges of the lord arbitrary, the services under the latter were certain, and the lord's privileges beneficial to the tenant; the lord by military service took

the lands of his ward for his own profit, and disposed of the ward in marriage for his own advantage; but the lord of the socage tenant was obliged to take the custody of his ward's land, and of his person also if the father was not living, for the benefit and protection of the tenant. The Rules of Descent were ultimately under both tenures the same; to the eldest son, and to the eldest male lineally and collaterally in succession, according to the rules of *primogeniture* in males, and preference of males, a rule established to this day as the law of the land; the paternal line took in preference to the maternal, unless the land descended from the mother's side; the father and direct lineal ancestors, and relations of the half blood being excluded.

The tenant could not originally alien any lands, without the licence of the lord; and as to inherited lands, not without consent of the next heir, but this restraint was gradually removed, and by the passing of the *Statute of Quia Emptores* in the reign of Edward the first, must be considered as finally extinguished.

The Heir under knight's service was of full age at twenty one; the guardianship in socage, ceased at fifteen, and the heir was entitled at that age to chuse his guardian; but the more



valuable privilege of socage tenure was, that the lands were *devisable by Will*, as also were lands by custom in various Boroughs.

With regard to Gavelkind, the customary tenure in Kent, the lands descended to sons and male successors, by the rule of *Equable Partition*, and there is reason to think that the same rule prevailed as to socage tenure generally, down to the reign of Henry the second; gavelkind lands as well as socage lands were devisable by will; and the heir in gavelkind was of age to alien at fifteen, the heir in socage being then only out of ward. The rule of equable partition prevailed in *Wales* until the common Law of England was made the Law of Wales in the reign of Henry the eighth; it was also the antient custom of *Ireland*.

We have spoken of the *Relief* payable by the heir on entry by descent; this was reduced upon socage tenure, now the only existing tenure except copyhold, to one year's fixed rent, and the like upon alienation; there was another service sometimes payable on the death of a tenant, the best beast, or best goods, or a sum certain, under the name of an *Heriot*. Reliefs and heriots exist at the present day. The tenure in villenage is now called *Copyhold*, the tenant holds nominally, at the will of the lord, but really by the custom of each particular manor;



liable to heriots, and to fines for alienation, which are fixed according to the particular custom of each manor, and are held either for life, or in fee, descendible according to the custom.

Land *escheated* for crime passed first to the king for one year, and then absolutely to the lord;—In *Outlawry* for civil debt, the king took the profits during the outlawry; For *Treason* the land was forfeited altogether to the king, discharged even of the dower of the wife, nor were entailed lands exempted from such forfeiture.

The age at which the tenant was permitted to exercise dominion over real property in all descriptions of tenure, except gavelkind, was very early settled at *twenty-one*. In the civil Law, minority lasted to twenty-five; in the modern Law of France it is fixed at twenty-one, and this may be considered as the established principle of the Law of England.

*Military Tenure* has now altogether ceased, it was abolished with all its peculiar incidents of wardship and marriage, and primer seisin; in England by statute in the reign of Charles the second; in Scotland in the reign of George the second.

The first feudal restraint that gave way to commerce, was that on *Alienation*; in the

time of Henry the first, the tenant was authorised to alien lands of his own acquisition, so as he did not totally disinherit his heir, but he was restricted as to such lands as he inherited, to alienation to his relations; the grants often expressed particularly the persons to whom the land might be aliened; *Magna Carta* we have seen restrained subinfeudations, but it was not until the statute of *quia emptores*, that the power of alienation, subject to a fine on alienation by the tenant in capite, and to the fixed relief of one year's rent to the lord of socage tenure, became universal and unlimited.

The law authorised restricted grants; *gifts on condition*, and gifts to a man and the heirs of his body, were not uncommon; the effect was, that on his having issue, it was considered as a condition performed, and he remained invested with the absolute dominion. In the thirteenth year of Edward the first, the *Statute de Donis* expressly declared that *the will of the giver according to the form of the deed of gift manifestly expressed, should be from thenceforth observed*; thus the land was secured to the issue to the remotest generation, and failing such, reverted to the giver. The spirit and effect of this Act was, to preserve land for ever in one family. The civil



law, although it allowed the *substitution* of one person for another, as heir in a certain event, and even a repetition of substitutions, was a stranger to entails in the sense established by this Act, and as they continue the law of England to this day.

As far as this famous law, the statute of great men as it was called, was declaratory of this principle,—that the owner may in his deed express his will as to the destination of his land, and that such will shall be observed, without being subject to be defeated by technical niceties and subtleties which he cannot comprehend; it is a law which we ought to hold fast and cherish as the Great Charter of the law of real property; it is all that we can desire at the present day. But it was defective in this, that there was no regard to restriction as to the duration of that will, as a particular law of succession for that property, so that thus all land might be taken out of commerce for an undefined period, and there might be as many individual laws of succession as there were distinct properties; this is the kind of restriction which we want to have defined and understood at the present day, so that every man may deal with his property as his own; to answer all purposes of provision for families, for debt, and other legitimate objects; for so long a



period as the law in reason allows him, and then to revert into commerce; and so that he may not be liable to have his intention disappointed, or the persons to whom the land may pass when restored to commerce, so exposed as they are, to danger, vexation, delay, and expence, by the intricacies and subtleties in which the settlements of property may have involved it.

Such is the origin of the *Law of Entails*, a principle which more intimately and essentially affects the whole law of real property at the present day, than any other point of feudal history; but this attempt to secure land for ever to the existing families, for such was its obvious intent, was not agreeable to the growing commerce of the Country, and it gave way to an invention by an indirect mode of avoiding its consequence, a mode of barring the entail, which there is no sound reason for not now legalising in a direct manner.

The Statute *de donis* was soon followed by one of more importance, by a law on which is founded the free power of alienation at the present day, restoring the antient unlimited right of dominion, and in effect as to alienation, converting all land except copyhold into allodial property. The Statute of *quia emptores* of

the 18th Edward 1st prohibited subinfeudation, but *authorised the free alienation of land to be held of the superior lord*; with an exception only of tenants of the crown in capite, to whom however the same privilege was soon after extended upon some fine, by way of composition, which ultimately ceased with the abolition of the tenure itself. *Thus was perfected the power of voluntary alienation.* Still *alienation on death bed*, the transmitting of land after death to successors nominated by the proprietor, was as to all lands held by military service, prohibited, although it was frequently effected indirectly by an alienation in the life time to take effect after death, with confirmation by the heir; or more effectually by the *invention of uses*, which will presently be explained.

In all feudal grants the lord had a *reversion*, a right of property, to which the services were incident during the continuance of the tenant's interest and the possession when that tenure ceased! Out of this reversion arose a *remainder*, an interest, to take effect at the determination of the previous or particular estate; the particular estate might be for years, for life, or in tail; the particular estate, and the remainder making up, as to the reversion, one estate; and therefore it was a rule that both should

pass out of the grantor at one time, and be created by one conveyance. The remainder might either be *vested*, that is, a right existing in a particular person, to take effect at the expiration of the particular estate; or it might be *contingent*, when it was to take effect, on an event which either might never happen, or not happen until after the end of the particular estate, or was limited to a person not in existence as the unborn son of a particular person. In these cases, if the particular estate was determined either by its natural expiration, or by the voluntary destruction of it by the owner, before the person in remainder was capable of taking according to the form of the gift, the *contingent remainder was destroyed*, and never could take effect at all.

The principle on which this obtained was, that it was necessary there should always be a tenant of the *freehold* to answer the services to the Lord, and failing that, the reversion took effect. Upon the same principle, it was necessary that the freehold should at the time of the grant vest in some person, that there should be a vested particular estate of freehold. And as a further rule, after the limitation of a fee simple, it was not allowed, upon any condition or assigned event, to make that estate cease, and the land to pass to ano-



ther. It will be seen then, that there existed strict and technical rules, according to which alone, remainders could be limited; and which, although they are in the most part now not operative, under the existing practice of limitations by deed to *uses, and devises* by will, yet partially, for instance, as to the necessity of a continuing estate of freehold to support a contingent remainder, these rules continue in force, and operate inconveniently, to render complicated and uncertain all prospective limitations.

Previous to the statute *de donis*, if land was granted to a man and to the heirs of his body; then on his having issue, the condition was considered as performed, and he became so far absolutely seised, that he might alien at his pleasure,—on failure of issue born, the reversion took effect, and could not be barred; no remainder could be limited on such an estate; but after the statute, it was allowed to limit a remainder on an estate tail; thus there was no legal prescribed time within which such a remainder was to take effect; nor is there at the present day, if limited after an estate tail.

*Terms of Years* were granted at this period for the purpose of use and cultivation; and long terms of years, without reference to such

purposes, were probably unknown. The termor, before his actual entry on the land, had an interest called an *interesse termini*, which only gave him a right to enter, and not strictly any estate; a term of years, of whatever duration, was and still is considered in law, as inferior to any estate of freehold, determinable on death, or other uncertain event, it is treated as a chattel interest. In all judicial acts, and in all rules regarding alienation, it was the estate of freehold only was considered, the term of years was disregarded. The seisin was considered to be in the first estate of freehold, and if the land was recovered by judgment, either adversely or by covin against the freeholder, the termor lost his term, until his interest was protected by statute, in the reign of Henry the eighth—a term of years is now as firm and valid an interest as any other whatever.

Upon the grant of a feud, the lord was held to *warrant* the possession; to defend his tenant in the possession, or give him a recompence. This obligation might arise by implication from the tenure, or be expressed in the grant; in either case, the tenant on being impleaded would *vouch* the lord or grantor, or call on him to defend the right, and he might call on his superior, or the



person who warranted the land to him. Grants almost universally contained an obligation by the grantor to warrant the land to the grantee and his heirs, against all the world.

Warranty was binding on the heir, so far as he had assets or lands in fee simple by descent to answer it, with this very peculiar and unreasonable distinction ; that as to any person on whom such warranty should descend as heir, who might have any title to the land *not* derived through the ancestor who made the warranty, he was by such *collateral* warranty barred of that title, *without assets* ; the consequence was that even a tenant for life, for the warranty might be made by any person having the freehold, might by warranty bar the person in remainder, in case such person should be the heir of the person making the warranty. This part of the law was only finally made an end of by statute in the last century, but still a warranty may be made by every person having an estate of inheritance, which binds the heir with assets ; warranty of tenant in tail was not suffered to bind the issue in tail, being contrary to the statute *de donis*, but it would bind at this day the person in remainder being the heir of the tenant in tail, for instance the next brother. A warranty is at this day contained in every *fine*, but never in any other



conveyance, being superseded by covenants for the title, which are restricted to such guarantee of the title as is agreeable to the intention of the parties; it is still however, I apprehend, implied in all grants to a tenant to hold under the grantor, such as leases operating by the Common Law.

Founded on the doctrine of warranty, was invented a fictitious proceeding, by which estates tail established as was thought on a firm footing by the statute *de donis*, yielded to the convenience of mankind, and were again unfettered and restored to commerce; that act had expressly provided, that *Fines*, or final agreements made between parties in a suit, adverse or friendly, whereby the right of the land was acknowledged in one party, should *not* affect the right either of the issue or of those in remainder or reversion. In the reign of Henry the eighth, *Fines* were established, to be a bar to the issue, but not to those in remainder.

But the effectual mode invented to destroy entails and all remainders and reversions, was that of a *Common Recovery*. This proceeding, although known and practised long before, as a means of alienating land to the church in mortmain, was not established as a bar to an entail, until the reign of Edward the

fourth; The form is this, — a person pretending to claim title to the land, either the person to whom it is to be alienated, or any other *Demandant* on his behalf, impleads by collusion the actual tenant of the freehold in possession, some person who is made the *Tenant* for that purpose, by the conveyance of the real tenant, so that the concurrence of the real tenant of the freehold in possession is requisite;—The tenant appears and *vouches to warranty* the *tenant in tail*, who in his own person, or by his attorney authorised by his warrant under his hand, appears and vouches, the crier of the Court, the *common vouchee*, who readily undertakes the warranty but makes *default*, and *judgment* is given that the demandant recover the lands against the tenant, and the tenant a recompence in value against the tenant in tail, and the tenant in tail against the common vouchee; thus the demandant gains the land, discharged of the entail, and all remainders and reversions expectant on it; and he becomes seised to such uses and purposes as the tenant in tail and tenant of the freehold in possession shall dictate. The proceeding therefore, in effect, enables those persons concurring together, to cut off or bar all limitations which



were to take effect after the estate tail; merely by means of the deed by which the tenant in possession conveys the freehold, and by which he and the tenant in tail declare the uses; and the only other act done by the tenant in tail, is the appearing to consent in Court, or by his signature to the warrant authorising his attorney to appear on his behalf.

It is needless here to enquire upon what principle such a recovery was held to be a bar of the estate tail, much less to the persons in remainder; It is sufficient that it was so settled, established by judicial decision, and thereby all the evil of a perpetual entail was put an end to.

Complicated as this proceeding may be, the result was full of convenience, and in fact at the present day secures the combined principle of family settlement with the free commercial quality of land, in a way probably as near the rule of sound reason as any Code which could be devised. Repeated attempts were made to restrain the power of the tenant in tail of suffering a common recovery, by clauses for forfeiting his estate, but the Courts wisely adhered to the principle, and refused to acknowledge the validity of any contrivance in contravention of it. In Scotland it is remarkable



that entails were not fully established until they were expressly sanctioned by an act of the legislature so late as the year 1685, and no means having been yet allowed directly or indirectly of barring them, an intricacy and perpetuity of settlement has been thus introduced, which little short of a revolution in property can set free.

Thus was the *power of alienation perfected in the tenant in tail*; by *fine* he bars his own issue, and by *recovery* he bars all the world; besides these modes, he might, and still may, by making a feoffment with livery of seisin, the peculiar force of which mode of conveyance will be presently further explained, or by any alienation with warranty, *discontinue* the estate of his issue and of those in remainder, by which means, both the issue and the remainder man claiming after the death of the tenant in tail, are barred of their right of entry and possessory remedy, and put to their remedy by real action.

The law acknowledges three distinct titles, which may exist in land at the same time in different persons; the possession, the right of possession, and the right of property. *Disseisin* was antiently an actual ouster by force, a forcible disseisin is not likely to occur at the present day; Disseisin however may still

take place; the disseisor, in such case, gains the actual possession, the disseisee has the right of possession or right of entry, and he might recover possession antiently by the writ of *novel disseisin*, or in modern times by means of the possessory action of *Ejectment*, or the disseisee himself may continue his right of entry by making *continual claim*; otherwise, on the disseisor or his alienee dying in possession, provided in case of the disseisor himself he has been five years in possession, a *descent* is cast, and the heir on whom the right descends, is presumed to be in possession by right, until the contrary be shewn; and thus is acquired the right of possession, liable only to answer to the right owner in a real action.

It will be material, when considering the law in regard to acquiring right to land by prescription, to mark this distinction between the right of entry maintainable by possessory remedy, and the right of property to be restored to possession only by real action. The only remedy in modern use for recovery of possession is by *Ejectment*, a fictitious kind of suit, but in all its essential qualities founded on the most equitable principles, and attended with the most convenient practical effects;—a right of entry and of possessory action consequent on



it, is now by statute limited to twenty years after the right accrued.

A *Grant*, with *Livery of Seisin* or *Investiture* of the tenant upon the land, was the only mode of passing the freehold when the land was in the actual possession of the grantor; it might be made in writing or by parol, and was called a *Feoffment*. A Remainder, a Rent, an Advowson, Right of Common, or other Incorporeal hereditament; any interest in land not capable of manual occupation, passed by grant without livery, emphatically called a *Grant*; such a grant could only be made by deed in writing, and was the general mode of conveyance, unless the grantor had actual possession, so as to deliver seisin; it was necessary on such a grant, that the tenant should *attorn*; but that form has since been rendered unnecessary. A term of years was created by *Lease*, in writing or by parol, and entry thereupon. The freehold might be granted to the termor for years by *Release*. Such were the modes of conveyance at common law. Of these, a feoffment only, had this effect,—that it passed a freehold by virtue of its own power, whether the grantor had any rightful estate or none; in the latter case it amounted to a disseisin of the right owner, and passed to the grantee an estate of free-



hold by wrong; such is the law at the present day, and hence a feoffment is called a *tortious* or wrongful conveyance; the essence of the feoffment was the livery of seisin, or delivery of possession in the presence of witnesses; a livery on one spot was sufficient for all lands in the same county; the whole ceremony might be by parol, the charter was no otherwise essential than as a record or evidence of the transfer.

The *Feoffment* required *Livery*, the *Grant* required *Attornment*—the Lease or Exchange required *Entry*; it was only the *Surrender* or *Partition* which were complete without either of those ceremonies;—thus all those modes of Conveyance at common law, which in their nature admitted it, required some notorious act to be done on the land, with knowledge of the tenant, or of the Country; *Fines* were judicial records, and were *proclaimed* in the County. The principle therefore of notoriety of conveyance is clearly one of the common law, but that notoriety of transfer never in any part of our history appears to have suited the wants and convenience of the people, for we shall presently see that conveyances perfectly secret, were in effect introduced by the doctrine of uses and trusts: we have observed that the feoffment might be by parol

only, without writing, but then the witnesses were originally the tenants of the Lord's Court, or the suitors of the County Court; or in towns, officers of the Borough; and in fact a written Charter was in general use under seal of the party, recording the names of the witnesses, and which was necessary for the purpose of warranty.

Under the doctrine of uses were introduced the *Bargain and Sale*, and the *Covenant to stand seised*; each was in effect an agreement only, the former importing that in consideration of money, the land was sold; the latter that in consideration of blood, or marriage, the covenantor would stand seised to the use of any of his family; the former before the statute of inrolment of Henry the eighth, might have been by parol only, the latter always required writing. Neither of these operated by transmutation of the possession and legal title, but merely as transferring the *Use*, or beneficial interest.

## CHAPTER XV.

### *Alienation by Will—Attachment for Debt — Servitudes — Curtesy — Dower.*

SUCH were the modes of alienation *inter vivos*;—With respect to alienation by will, the testamentary power over land has been introduced gradually, and its history is clearly defined. The Romans allowed of testamentary disposition, preserving one fourth of all property for the natural heirs; By the common Law of England, the testamentary power as to *moveables*, extended to one third in case of wife and children, half if wife or children, and in default of either, then the whole; this restriction gradually wore away, common sense was so obviously in favour of giving a man the unlimited power of testamentary disposition over his moveable effects, which he might alienate in his life time at his pleasure; that although the alteration cannot be traced, it was very



early the law, that all moveables might be disposed of by will. As to land, testamentary disposition was obviously inconsistent with feudal principles; It was first permitted by custom in Boroughs, and gradually by custom in other places; it still exists by custom only in Copyholds. The want of such a power was a principal ground for the invention of *uses*, by which the beneficial interest in land was made subservient to disposal by will, and terms of years in land were always considered as chattles, and disposeable as such. In Scotland, to this day, the direct power of disposing of land by will does not exist; it is only effected in the form of a deed, with a power to deliver possession.

A power of alienation by will was sometimes expressly given in the grant; it is not clear how far this was allowed to be exercised merely in the form of a will; it is probable that in fact by this means, by custom, and through the introduction of *uses*, the power of testamentary disposition over land was very generally exercised; when by an Act of the legislature in the reign of Henry 8th, the power was expressly conceded as to all Socage lands, and two thirds of lands in knight service, and which by the abolition of that tenure, is now universal.

With regard to involuntary alienations by attachment for debt, — By the strict feudal law, land could in no case be so attached, the only process was against the goods, or to be levied on the produce of land, except by process at the suit of the Crown. It appears by Glanville, that at that time land might be pledged for debt by actual delivery of possession, by which means the creditor, after notice in Court, acquired an absolute right to retain or sell the land, much like a foreclosure on a modern mortgage; but there was no direct process for debt against land, until by statutes in the reign of Edward the first, the merchant creditor, upon a security taken in the manner prescribed, called a *Statute merchant*, was allowed to take and hold the land of his debtor to satisfy the debt; a privilege extended in the reign of Henry the eighth to any creditor taking a security judicially recorded, called a *Recognizance*. Neither of these kinds of security are, as far as I am aware, in modern use, although there is no legal objection to their being perfectly available. In the reign of Edward the first, a right was given to every creditor, after having used, if he thought proper, his privilege of seising and *selling the goods* of the debtor by *feri facias*,



to choose a new writ, by which he might have delivered to him *half* the lands, thence called an *elegit*; and these are the only remedies existing at the present day against the debtor's lands, under any judicial process at law, in suits for debt.

Under an *elegit*, as well as under an execution on a statute merchant or a recognizance, the land is delivered to the creditor, to apply the profits in satisfaction of the debt, and he is accountable for such profits; it is only under the bankrupt laws, taking their commencement in the reign of Henry the eighth, that the lands of *traders* were first made liable to be *sold* for debt. Again, it is only half the land that is liable to be seized by a creditor on one judgment, but the same or any other creditor may seize the other half on another judgment, so that this privilege of the debtor of keeping half from the first attachment, tends to nothing but increase of expence and inconvenience to both parties. In Scotland, the creditor obtains possession of the land, with a privilege of holding it permanently at an appraised price, and of having it judicially sold if not redeemed in ten years; with provisions, similar to our bankrupt laws, for sale of the lands of an insolvent.



Upon the death of the debtor, there was no remedy against the land, unless the heir was expressly bound to payment of the debt by the deed of his ancestor, nor is there at the present day; if the heir be bound, then the creditor may sue him as being charged in his character as heir to pay the debt, and the heir is liable to the debt, so far as the lands descended to him will in value extend, and no farther, and so far only as the moveable goods are insufficient; the lands however are not considered as specifically pledged to the debt, and if aliened by the heir before action brought, the lands cannot be reached, but the heir is liable to the value.

The day will probably come, says Dalrymple, when all land becoming allodial, and the more easy and complete attachment of it becoming necessary, the rule of the Roman Emperor laid down in the Pandects, and made when the feudal relations, and the bar to alienation of land property consequent on them were unknown, will be the law of the world.—By that law it was ordered, that a portion of the moveables equivalent to the debt should first be sold; but if these did not suffice, that an equivalent portion of the land should be sold, and if no purchaser appeared, that the subject

offered to sale, should become the property for ever of the Creditor.

With regard to rights emanating out of land or *Servitudes*, such as rights of common, of way, light, or water, termed in our law *incorporeal hereditaments*, being the subject matter of conveyance by deed only, and not by parol, they are in general liable to all rules of law of land property, except perhaps, as appears very early in the common law, that an actual right is acquired to them by twenty years' undisturbed possession, that period as to land being only a bar to the possessory remedy. Being necessarily appurtenant to land, they pass with it, and are subject to all the modifications of interest to which the land itself is subject. There may also exist a right to the minerals or any part of the soil distinct from the right to the produce of the land, and subject as a distinct inheritance, to the same law of property ; such a right may be originally created and granted at the present day ; but it is not clear how far there was any mode of separating any part of the beneficial interest in the produce of the land from the right to the land, by any direct limitation or operation of common law ; no such separation could at present be legally effected, except by the operation of trusts, for the limited dura



tion to which trusts are permitted to endure. It was always lawful, however, to impose any condition not repugnant to rules of law on any tenant for a limited interest, for years, for life or in tail, by the words of the grant, entitling the grantor and the reversioner to re-enter for the condition broken.

Estates might be made liable to *Rents*, and those rents subdivided, and limited by way of remainder; lands might be limited to any number of persons as tenants in common in any shares; but still it will be obvious, that many cases might arise in which the convenient and commercial use of land property would require the profits of the land to be made liable to more minute division and modification, and subservient to events and contingencies in many ways. Such purposes could not be effected by direct limitations at common law, and hence among many other reasons the introduction of *uses and trusts*; which were not liable to the strictness of common law limitations.

If a rent was reserved to the reversioner, a right of distress attached by law; if a rent were granted to a stranger, no right of distress attached, unless such right was expressly reserved in the deed; hence the first was called rent-service, the second rent-seck, and the last



rent-charge; but now by statute, the right of distress is incident to all. There appears never to have been any limitation in law, as to the time for which a rent might continue separate from land, nor any restriction as to its amount in relative proportion to the value of the land.

The estates in land *incident by law*, are the Estate of *Dower* and *Curtesy*. The estate by the *curtesy of England*, is that estate which the *husband* becomes entitled to for life in all lands of which the wife is seised during the coverture, of an estate of inheritance in fee-simple or fee-tail, provided there be issue born of the marriage capable of inheriting the estate. The estate of *dower* is the right which the *wife* acquires by marriage, to the third part, for her life after her husband's death, of all the lands of which her husband is seised in fee-simple or fee-tail during the coverture. The right of the husband by the *curtesy of England*, is founded on equitable principles, and not attended with any practical inconvenience; but the right of *dower*, attaching as it does, not only to the landed possessions of the husband at the time of the marriage, which are all that could with propriety be in contemplation on the marriage treaty, but to such lands of inheritance as he may acquire by pur-

chase, or which may come to him by any means during the coverture; such a right operates in practice to fetter the power of purchase and alienation, with but little foundation in reason or utility to compensate for the inconvenience. The husband may, and almost universally does in practice, take means, by some technical mode of limitation in his deed of purchase, to prevent the right of dower attaching; so that in fact the privilege of the wife over lands acquired subsequent to the marriage, is of little avail, and it may be that the increased facility and simplicity in transfer, arising from an abolition of the right, would, even regarding the wife's interest, more than compensate for any loss by such an alteration of the law.

At the time of Glanville, who wrote in the reign of Henry the second, it is clear that the right of dower was restricted to lands of which the husband was seised at the time of the marriage, unless the husband immediately on the marriage expressly endowed his wife of his after acquired lands; she had then no right of dower in purchased lands, unless so endowed; although the law must have been soon after settled as it stands at the present day.

## CHAPTER XVI.

### *Uses and Trusts.*

UNLESS some clear idea be acquired of the nature of *Uses and Trusts*, it will be hopeless to undertake any profitable examination of the law of conveyancing. Trusts were well known in the civil law, and though little or no trace is to be found of them in modern European codes, yet it will be obvious there are various purposes, to which property, both real and personal, cannot be conveniently made applicable, without the aid of *personal confidence*, and the security of law to enforce its performance.

Trusts in our law grew out of uses, and however distinct be the system of equitable doctrine as to trusts at the present day, from the law of uses at their first introduction; it will be difficult to understand the bearings of the different rules which courts of equity have adopted, or to take a practical view of the



system as it exists, without some previous attention to the steps by which that system has been reared.

An use is,—Where lands were conveyed to A, either expressly to the use of B, or more commonly under a secret trust or confidence that B. should receive the profits, and that A. should convey as B. should direct. These uses or trusts, for at no period has there been any substantial distinction in the words, might be created by writing or by parol, and if created for lawful purposes were enforced in the courts of equity.

Many causes have been advanced as the origin of uses, all may have contributed to different parts of the contrivance, and to which belongs the merit of the invention is matter of little interest. Lands being freed from the feudal restraint on alienation, and transferable by the simple forms of feoffment with livery, grant with attornment, or lease with entry; there was no cause arising from this source, for the inventing any new mode of conveyance. It is probable that uses were first introduced to evade the statutes against mortmain, a secret confidence being placed in the apparent proprietor that he would apply the profits to the religious purposes which the law prohibited.

The next cause, and probably that of the

most extended operation was, the wish to acquire the power of testamentary disposition; the use or confidence might be disposed of by will; a further inducement was to evade execution for debt, and to conceal the tenant liable to the process in a real action; there yet remained other motives, to avoid the consequences of escheat and forfeiture, the incident of dower, and the fruits of ward and marriage, and other burthens of military tenure; the *Cestui que use* was liable to none of these burthens or restraints. The law took no notice of the use, consequently the land was liable to the feudal consequence of escheat attaching to the estate of the trustee, and is so liable to the present day.

The Use was raised in various ways according to the purpose intended to be effected. The common case put in the books is, that of a feoffment to A. and his heirs, without any consideration expressed, or any express use declared; and it is said that after the statute of *quia emptores*, when all consideration from tenure as between the feoffor and the feoffee was at an end, the consequence of every such feoffment was, that the feoffee stood seised to the use of the feoffor. It does not appear that the same construction was put on a grant or lease, or probably upon a release or confirmation, by



which the estate of the grantee or lessee was enlarged or confirmed; the deed itself imported sufficient consideration; but with regard to a feoffment, the essence of which was the verbal livery, this construction, which if confined to feoffments without deed, might be founded on just principles, when applied to a solemn charter of feoffment, was evidently contrary to sound reason. How soon this construction was adopted it is not easy to say; the early charters of feoffment rarely mention any consideration, and it is probable that the construction was only thus far admitted, that in case of the feoffor claiming the use, it was thrown upon the feoffee to prove the consideration.

This was called the *resulting use*; the same rule obtained on Fines and Recoveries, and as to those species of conveyance, exists to this day; and with some reason, because the Fine or Recovery is matter of form, and it is the deed of uses which more aptly represents the intention of the party. The modern doctrine, as far as regards conveyances operating at common law, does not require a consideration to be expressed, or use to be declared, and for want of it, construes the conveyance to operate only to the use of the grantor; but admits many minute distinctions, by which the use is held



either to result to the grantor, or pass to the grantee, according to the intent of the parties to be collected from the whole transaction; and whatever may ultimately appear to be desirable in regard to any alteration of the law of uses and trusts, this doctrine of resulting trust, is one which it may be found impossible to define, and necessary still to leave to equitable construction. I will only observe that in this and many other parts of the equitable system, a greater latitude is given to parol proof of rights in land, than either the policy of English law, the security of commerce, or the rules of justice, appear to admit.

Besides the resulting or implied use, there might be a direct or special use declared, either resting solely in the confidence of the feoffee, or expressed in the deed; and *that*, either for a lawful purpose, such as to hold the land during the absence of the feoffor and to perform his will; or for purposes which were considered covinous and unlawful, to avoid the services due to the lord, or disappoint a creditor: the distinction indeed between the one and the other, cannot be now traced, nor would there be any utility in such an inquiry; the principle is preserved and defined in the existing laws against fraudu-

lent conveyances, in favour of creditors and innocent purchasers.

The use so declared might be by deed or by parol ; it was obviously necessary that there should be the means of discovering and enforcing such a trust. A court of equity alone acted on the conscience of the party, through the means a discovery on oath ; the subpoena and bill in chancery, first introduced, it is said, in the reign of Richard the second, was applied to this purpose. But the confidence was still considered so entirely personal, that it was long before it was permitted to be enforced beyond the individual feoffee ; his heir was not considered as compellable to execute the trust, and his alienee without notice of the trust is not liable to present day. But in a general sense, this idea of the confidence being personal only, is now exploded, and a Court of Equity looks only to the nature and intent of the trust itself, and deals with the legal estate, wherever it be, so as to give the trust its full effect ; the Court of Chancery, they say, never wants a trustee ; still however the legal estate is permitted to be a substantive, and in law the only existing right ; all the inconveniences of the estate of the trustee being liable to the rules of legal title are suffered to remain ; and the doctrine of the necessity of a legal seisin



to serve the uses, a kind of title even more ideal than that of the trustee's estate, is still permitted to involve the law of conveyancing in very perplexing intricacies.

The feoffee to uses, was and still is the sole owner recognised at law, the estate in his hands was at first considered liable to all the incidents of escheat, and debt, and dower, to which land in his own absolute dominion would be subject; it still probably remains legally liable to escheat. How far the Court of Chancery treated the use before the statute of uses, as an estate in that court liable to the same rules as to voluntary alienation and transmission to heirs, as would attach to a legal estate at common-law, it is not necessary now to enquire; in regard to devise by will, it was treated we have seen differently, and as to attachment for debt, the use was clearly considered exempt, because the aid of the legislature has been necessary as to uses before the statute, and as to trusts since, to render them so liable; but the established doctrine of Courts of Equity at the present day has so entirely submitted trust estates to all the rules of the common law, that except for the purpose of discovery as to resulting trusts, and executing such trusts as involve any act of discretion, under the authority of a court of



Equity, except so far as the machinery of such a Court is convenient for these objects, there does not appear to exist any sufficient ground, from the nature of a trust estate, for excluding the jurisdiction of Courts of common law over such estates.

But to return to the history of uses, there is no trace of such an invention in Glanville or Bracton, down to the end of the reign of Henry the third; the first legislative notice of an use, is the Statute 50, Edward the third, which clearly proves that special trusts were then in practice; it declares void, *gifts of lands to friends in collusion* to retain the profits, and thereby defraud creditors. In the 15th Richard the second, a Statute was passed to avoid *purchases to the use of religious houses*. By the Statute 11th. Henry the sixth, it was provided, that tenants for years or for life, committing waste, should not, by transferring the estates to trustees, save their lands from *forfeiture for waste*. But still the language of the legislature in the 1st. Richard the third, expressed the increasing inconvenience,—“Forasmuch as by privy and unknown feoffments, great unsurety, trouble, costs, and grievous vexation daily grow betwixt the king’s subjects, insomuch that no man that buyeth any lands, nor women that have jointures or

“dowers, nor men’s last wills to be performed, nor leases for terms of life or years, nor annuities granted, be in perfect surety,”—for remedy, it is established that every estate of lands made and to be made shall be good to him to whom it is so made, and all others to his use, against the grantor *and all persons claiming to the use of the grantors*. The intent of this act was, not to abolish uses, but to confer on the cestui que use the power of alienation over the land. Its effect however was neutralised, by its operating only in case of alienation, and still allowing the trustees acts to affect the estate, and leaving the lands liable to his debts, feudal services, dower, escheat, and forfeiture. The statute was not considered as extending to terms of years, or to any use upon a less estate than a fee simple; and it was evidently confined to such *uses* as included the whole beneficial interest, and not to trusts for special purposes.

In the reign of Henry the seventh, by several statutes, the *Cestui que use* was made liable to the real action, to the feudal services of ward and marriage, to the relief and duties due to the lord in socage, and to execution for debt; still the use was not upon the death of cestui que use considered as assets for payment of debts, either in the hands of the heir or executor.



The leading statute upon which the whole law of conveyancing rests at the present day, the STATUTE OF USES, passed in the 27th Henry the eighth, declares that, *where any person shall be SEISED of lands to the USE, CONFIDENCE, or TRUST of any OTHER person by any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or any other means, the persons that shall have such use, confidence, or trust in fee simple, fee tail, for life, or for years, or otherwise, or in remainder or reverter, shall be deemed to be in the LAWFUL POSSESSION of such lands to all intents and purposes, of SUCH LIKE ESTATES as they had in the use or trust.* By a subsequent clause the same principle is extended to *Rents*, giving to every party entitled by any means to receive any specified rent, a legal seisin of the rent, with power of distress.

This statute, by annexing the possession to the use, extinguished the distinct existence of the use, but it did not destroy conveyances to uses; on the contrary, it expressly recognises their continuance. The preamble shews that one of the intents of the act was, to bar the power of disposition over the use by will; but within five years after, the legislature authorised the free disposition by will of the legal possession and estate; so impossible was it,



to stop the current of public opinion towards the absolute freedom of alienation.

In fact, the statute rather confirmed and established conveyances to uses; the Use, is a right to receive the profits;—The inconvenience being, that the absolute right to receive the profits should be distinct from the possession, and from the liabilities of possession of the land; the remedy was, that the possession should follow the use. The act did not declare all conveyances to uses void, and confine all alienation, to the simple mode of transfer at common law, by open transmutation of possession; but assuming the existence of conveyances to uses, and building on that foundation, it transferred the possession to the use. The intent of the act was to unite the legal possession, with the beneficial interest; it is obvious such intent could only take effect where the use or beneficial interest was absolute, not absolute in respect of duration of estate, but absolute in respect of the right to or pendency of the profits, during the estate limited in the use. The act treats the words use, trust, and confidence as synonymous; where lands are made to the use, trust, or confidence *of* any person,—that is, where such person by the intent of the deed has the pendency of the profits, such use

trust, or confidence, becomes by operation of the statute a legal seisin and possession.

But there were before the statute, and there must ever exist, in order to make land subservient to the useful purposes of property, many occasions where the lawful and praiseworthy intents of parties, cannot be conveniently effected without the aid of *trusts*; the special trust lawful, as Bacon terms it, where some purpose is to be answered, distinct from the simple beneficial interest or permanency of the profits, and where therefore it is obviously impossible that the intent of the statute, of uniting the use and the possession can have effect. Take for instance the case of a conveyance to a man, for the purpose of his conveying back to the grantor in tail, with remainders over; or to receive the profits during the grantor's absence beyond sea, and to convey as he should direct by his will. The purposes that may be answered in this way are endless, how otherwise can a provision be made for sale for payment of debts, or to raise money for any objects of family or commercial arrangements? Trusts then must exist; it has been attempted to distinguish trusts, as direct and indirect, executed and executory, but it will be more clear to consider all trusts to be in their nature indirect, special,



and executory, and to be designated simply by the word TRUSTS.

The intent of the statute was, to unite the possession to the beneficial interest, and bar the co-existence of these distinct rights; but it being found impossible to restrain the practice of trusts, and that system being necessary for the convenient use of landed property; the only legitimate object of the legislature would be, to prevent any separation of the beneficial interest from the possession, farther than the purposes of the trust necessarily require, and to permit every purpose of a trust, not depending on the discretion of a trustee, to be effected by a direct legal interest in the land.

A very confined construction of the Act did in fact entirely neutralise its effect; it was decided that an use could not be raised on an use, so that upon a conveyance to A, to the use of B, to the use of or in trust for C, the legal estate was executed in B, and he would hold in trust for C; and thus under the name of a trust, all the evil of the separation of the beneficial interest from the possession, was revived.

Now although trusts which involve acts to be done, or discretion to be exercised by the trustee, must be allowed; the mere trust,



where. A has the legal estate, and B has the profits, is nothing but the perpetuating of the evil, the statute was designed to remedy, and perplexing the title without any legitimate advantage. In the construction of a will the Court looks to the *intent* and construes a devise to pass a legal estate, or to be a trust only, according as it will best answer the testator's intention; and the legal estate is held to reside in the trustee, for such period only, as the general intention appears to require.

It has been decided, that a trust to receive and pay over the rents, does not vest the legal estate in the person entitled to the beneficial interest. The existence of the estate of the trustee distinct from the beneficial interest, for any period beyond the necessity of the case, is an evil in many ways; it encumbers the title with two lines of descent and conveyance instead of one; it removes the beneficial title out of the ordinary jurisdiction of the common law; it introduces unnecessary distinctions as to the modes of attachment for debt, and legal incidents; and leads to practical anomalies highly inconvenient, if not unjust, in regard to the administration of assets, and the law of limitation for prescriptive rights. The necessity of the keeping an estate in the trustee may be avoided, in many instances in which

it is at present adopted, particularly in regard to trusts for married women and infants; and in all cases provision may be made for continuing the estate of the trustee, without being fettered with the rules of succession applied to an estate in full dominion.

In considering the effect of this statute there are two distinct subjects; the system of limitations to uses, and the law of trusts. First then, with regard to the doctrine of uses; and the great point is, whether the *Use* is not a very inconvenient appendage in the whole system of conveyancing; and whether, *retaining the TRUST, every syllable regarding the Use* may not be erased from the vocabulary of the law, and extinguished from its practice.

To consider this point with advantage, we must in a cursory way examine, to what purposes the law of uses is subservient. The common law, we have seen, admitted only of conveyance, by open transmutation of possession where the party was in possession; if not, then by attornment of the tenant, or otherwise by judicial record, or where it was to operate on rights not capable of manual occupation, then by a written deed. *Uses* introduced other and more secret modes of conveyance; upon a sale, a parol bargain accompanied with



payment of the consideration, would pass the *use*; a deed expressing any nominal consideration, or merely that a competent consideration had been paid, would have the same effect; as also a covenant to stand seised to the use of relations by blood. These modes of conveyance were continued and established by the statute of uses, and a *bargain and sale* is become the foundation of the greatest part of the present forms of conveyancing.

There can be no ground in common sense, why every variety of known interest in land, should not be created by deed, as well as by will, in any direct form of words expressive of the intent of the party; so that every deed should operate *directly*, as at common law, without the intervention of uses. There is no reason to assume as a consequence of such a rule, that in deeds of conveyance, technical expressions and approved forms would be more disregarded than at present; I should rather apprehend, that the more simple the form, the more plain the words as representing the intent, the more anxious would parties be to have that intent expressed in a way to ensure a certain judicial construction; the latitude assumed in expressing intention in a will, secret as it is, and revocable, would be no guide in framing a deed to which others



are parties, and requiring all the solemnities of legal execution.

In the construction of conveyances to uses, the courts have adopted a very inconvenient course ; in some respect tied down to the strict technical rules of limitations at common law, and in other points adopting the more liberal rules of interpretation which have always been applied to devises by will. In one point, the construction derived from the doctrine of uses, tended to introduce a distinction to which the common law was a stranger ; a *consideration* was in no way essential at common law to the validity of any conveyance ; the import of the deed, expressing the intention of the party, was fully equivalent to any consideration ; and it is contrary to the idea of free power of alienation to require any other ; it was a mere invention to raise the doctrine of uses. The law of uses requires, on a bargain and sale, a pecuniary consideration ; in a covenant to stand seised a consideration of blood ; and in all conveyances, either a consideration expressed or use declared ; in practice it becomes a mere form, a nominal consideration is sufficient, and it tends only to complication to make such a form essential. The protection of purchasers and creditors, from secret voluntary convey-

ances, is quite another matter; and the use resulting to, or interest remaining in, the grantor, as far as no purpose or interest be declared, might be retained as quite compatible with the simple rule of common law.

By the different construction introduced, as applied, 1st. to limitations under common law conveyances—2nd. to limitations by way of use under such conveyances—and 3rd. to limitations by way of use under conveyances by the statute, distinctions are made which are very perplexing, tend to no useful purpose, and throw discredit on the law. In fact, conveyances of the first kind are nearly superseded, and the whole system of modern conveyancing rests on the law of uses. Under the two latter, contrary to the strict technical rule of common law, which had its foundation in tenure, and has no longer any application, a freehold is allowed to commence, *in futuro*, that is, it is not required that the first estate of freehold be a vested interest, nor is there the least ground in reason at the present day for the continuance of such a restriction. So again, by a conveyance to uses, the use may be limited to the grantor himself, to his wife, or to his heirs as such, to none of whom could he directly convey at common law, but there



is no reasonable objection to a direct limitation of this nature.

Under conveyances to uses, it is still required that there be a person *seised* to the uses, that there be a seisin sufficient to serve the uses; entangled in such a difficulty, construction has been stretched to the utmost to raise such a seisin, termed literally, *scintilla juris*. Again, in conveyances to use, a large class of limitations are admitted, wholly inadmissible at common law, *shifting and springing uses, and conditional limitations*, limitations directed to arise and commence in existence upon future events; the common law allowed no means of defeating an estate, but by a condition of which the grantor alone could take advantage; but by way of use, any estate may be limited, to arise upon the defeating of a former estate, and not only so, but contrary to a plain principle of common law, upon the defeating of an estate in fee simple. Every marriage settlement is in its commencement an instance of a limitation of this sort, the land is limited to the settlor and his heirs until the marriage, and then, to the uses of the settlement; and provisions for an estate going over from the elder to the younger branch of a family, on the elder succeeding to another estate, or on declining to take a name, are in-



stances of the same kind ; there can be no objection to such limitations *direct*, without the medium of uses.

Again, a contingent remainder was defeated at common law, by the failure of the freehold on which it was limited, before the remainder could take effect; this strict rule has been preserved, and gives occasion to repeated limitations preceding every contingent remainder, for the mere technical purpose of supporting them, certainly a very useless piece of machinery.

Contingent Remainders, we have observed, may be barred by the act of the person having the preceding particular estate, unless they are supported by the means alluded to ; but shifting and springing uses are altogether protected from being barred by any such means.

In the same manner, all limitations by will, not being within the technical definition of a contingent remainder, are supported under the denomination of Executory Devises.

I would by no means be understood as having intended to describe all the nice distinctions to which uses are subject; it is sufficient, if the reader be convinced that there are subtleties in this part of the law, which it would be desirable to remove; and the

great question is, whether the best and only means of effecting that object, be not to abrogate the whole law of uses; to consider all limitations by deed, to be like direct limitations in a will, and liable to the same rules of legal and equitable construction; to accept the doctrine of construction upon wills, as a system of rules established upon known principles of law; merely abrogating those technical distinctions, such as the destruction of contingent remainders, as are still retained in the construction of devises; and not directly interfering with the system of trusts.

There is a large portion of conveyancing involved in the doctrine of *Powers*; such as powers of leasing, of selling and exchanging, to make a jointure, to charge with portions, to revoke uses, and various other purposes.—The abolition of uses would leave powers untouched, they are essential to the useful dominion over property, and as the limitations to be raised under them would be liable to precisely the same rules, as if inserted in the deed creating the power, there would be no necessity to interfere with them, further than to remedy some very inconvenient constructions which have been adopted. Such is the doctrine of the *illusory appointment*, where a party having a power to appoint



amongst a set of persons, is tied down by construction of law to appoint a share to each; so also the rules as to the *destruction* of powers, are uselessly nice and subtle; there seems no sufficient reason why any act should destroy a power, not done with that express intent and concurrence of the party for whose benefit the power is designed; and in regard to the mode of *execution* of powers, it would be more convenient to define by law, the act by which all powers should be executed, than to leave that law to the dictation of each individual.

It remains to observe, that in one respect a very technical construction was put on the statute of uses; it was held that the word *seised*, excluded its application to terms of years; No inconvenience has arisen from this construction, which the more confirms the impression, that no inconvenience would arise from abolishing the use altogether; the mode of conveyance of a term of years is direct and simple, the conveyance of freehold estates might be equally so.

The result appears to be, that; subject to the law against *perpetuities*, which will be explained in the next chapter, the period is arrived, when the legislature ought in effect to declare; that it shall be lawful by any deed



to express the intent of the parties as to the conveyance or limitation of any estate in land, without the limiting any uses, or being subject to any of the rules of law for the limitation of remainders, conditional limitations, or springing or shifting uses; and that the intent so expressed be observed, in the same manner as the like limitations would by law be construed, if contained in a will. It will be further necessary to declare, that the estate of the trustee shall always be deemed a fee-simple during the continuance of the trust, and when the trust is discharged, the trust estate so far as it is not disposed of for the purpose of the trust, shall at the expiration of the trust, *cease*, and be extinguished as if it had never existed. The object of such a declaration would be, to do away the very inconvenient machinery of trust terms of years, which will be better explained in a future chapter; to give the trustee full power of answering the object of the trust while it continues, and to prevent the trust from encumbering the title, after it is finished; and in order to continue the power of the trustee as long as the trust exists, the law might declare the estate continued in such persons as the parties according to the provisions of the deed should be enabled to

nominate, the law expressing the mode of such nomination to be simply by deed.

By this means we may hope that conveyancing would be more restored to the simple forms of the common law. Those forms which have their existence only from the system of uses, the bargain and sale, the covenant to stand seised, and the release operating on a bargain and sale would cease; attornment being no longer necessary to a grant, and livery and entry being appendages to a feoffment and lease which might be safely dispensed with, every conveyance might be reduced to one form, that of a *Common Law Grant*; and then the machinery of uses being at an end, any known estate in law might be limited direct to its object, and any trusts secured by merely naming the trustees, and expressing the purposes of the trust.

I have used the expression *known estate*, because nothing could be more deprecated, than any alteration of the law, which should have the effect of destroying the marks by which Estates, as describing the quantity of interest in land, have been ever distinguished by the common law. All estates as far as they are created by deed or will, are comprised in the four classes of, Estates for years, Estates for life, Estates tail, and Estates in fee; known

expressions create each interest, but it is only in regard to the two latter that any strict technical words are essential; in wills, the same strictness has not been required, or rather technical words are almost disregarded, and any expression indicative of the intention is held to be sufficient. But in deeds it will be necessary to preserve the same rule of interpretation and construction of the words of a limitation as at present exists, and therefore any alteration of the law of the nature suggested, must be guarded by a provision to that effect.

The reader will understand that by a statute of Charles the second, *parol conveyances* are no longer allowed, and no estate or interest in land can now be created or transferred, but by writing, with an exception only which Courts of equity have most injudiciously permitted and which ought not to be continued, the creation of an equitable charge on land, by deposit of the title deeds.

*The simple object to be attained is, that a DEED will convey any known interest in land, expressing in known legal terms, the INTENTION OF THE PARTY.*



## CHAPTER XVII.

### *Perpetuities and Trusts of Accumulation.*

So long as the present system of limitations to uses, with all its subtle intricacies, be permitted to continue, it will be hopeless to attempt to simplify the law and practice of conveyancing; *that* removed, and every further necessary modification will become easy. The system of entails I consider as so essential a feature in the Constitution, and so thoroughly interwoven with the best interests of the State, that it ought to be inviolably preserved,—Entails then being permitted, the same policy requires that some reasonable limit be assigned, beyond which no land be withdrawn from commerce by means of any private settlement or contrivance whatever.

We have cursorily endeavoured to trace the law of entail, from the Statute de donis to the introduction of the common recovery, and the legislative admission of the fine as modes of

putting an end to the entail itself, and all posterior limitations. Contrivances were afterwards invented, for preventing the tenant in tail exercising this power, which for some years partially succeeded; in the reign of Elizabeth, such a restraint in a will was held valid, but early in the reign of her successor, a more enlarged policy decided, that every contrivance to prevent the tenant in tail barring the entail, was absolutely invalid. In Scotland, unfortunately, a different line of decision has left entailed estates absolutely unalienable.

Previous to the statute of wills, we have little trace of the extent of limitation which was permitted in devises; but soon after that statute, men began to contrive how by limitations not agreeable to the rules of the common law, their estates might be moulded to their purposes.

No estate could take effect as a *remainder* at common law, which was not ready to vest at the time the preceding estate determined; the policy of the law required in every settlement of land, not only an estate of freehold at once vested, but that there should be a continual tenant of the freehold; considering a term of years as a chattel interest not affecting the freehold right. If a remainder depended

on such a contingency as was not necessarily ready to take effect, on the determination of the particular estate, or was limited to a person not in being, it was as already observed in the power of the tenant of the particular estate, to destroy such contingent remainder. No restriction could ever be imposed on a tenant in fee, nor could a tenant in tail under the improved policy of the law, be restricted from acquiring the fee. A restriction might be imposed on a tenant for life, but it could only be enforced by forfeiture, so that in either way, with or without such a restriction, the immediate tenant of the freehold could by destroying his own estate destroy the remainder, and at all events upon the expiration of such estate the contingent remainder must vest or could never take effect.

By the common law therefore, beyond a life in being at the date of the settlement, or death of the testator, and the attaining of the full age of twenty-one, by some person who must be in esse at such death, no land could be tied up from the power of alienation. There were rules which prevented any remainder on a prospective contingency, or possibility on a possibility, in short, on any contingency beyond that of there being issue of an existing person; an estate for life



might be given to such issue, but no estate could be limited over to their issue.

Such was the clear and reasonable rule of the common law; but in conveyances to uses, it was allowed to limit an estate to take effect on any future event, without reference to the existence of the preceding estate, and in subversion of such estate; moreover it was allowed to limit an estate to take effect, after an estate in fee, by destroying such fee; the same latitude was admitted in devises by will. In deeds, limitations of this kind were termed, if operating by defeating the particular estate, *Conditional Limitations*; if by defeating an estate tail, a *Shifting Use*; and if by being substituted for a fee, a *Springing Use*; in wills they were termed *Executory Devises*.

Every limitation after an estate tail, whether by way of use, or by devise, was barrable by the common recovery of the tenant in tail; but after the invention of these kinds of limitation, the introduction of which can hardly be traced beyond the reign of Elizabeth; and when in the reign of her sussesor, it was decided that neither the recovery of the tenant in tail, nor any act of a preceding tenant, would destroy such limitations; it became obviously necessary, to put some limit to such power of settlement. By a series of cases

in that century, it appears to have been established that any such limitation was good which must necessarily vest, or become incapable of vesting, during the compass of a life ; this was subsequently extended to 21 years after such life, and ultimately in a case in the time of Lord Hardwicke, to the period of a life or *lives* in being, and 21 years after ; but it was not until the time of Lord Mansfield, it became a settled rule of law, that beyond that limit, every limitation was void. That some positive period of restriction was necessary, to prevent the power of settlement extending to a perpetuity, is obvious ; this particular period was adopted as falling naturally into the objects of a settlement, a provision for the settlor's children, and being the nearest in analogy to the rules by which perpetuity was restrained at common law.

The rule appears in effect to be ; that no limitation of any estate or interest in land shall be valid, which shall prevent its vesting, or keep it from the power of alienation, beyond the period of a life or lives in being, and 21 years after, and is called, *the Law of Perpetuity*. It is not material in such cases how the fact turns out ; the point is, whether at the time of the creation of the limitation, the event, on which it is to take place, must hap-

pen within the allowed limit, if not, the limitation is void. The rule does not prevent any number of successive estates tail, or any remainder after an estate tail. The same rule was of course extended to all trusts, and to all interests created out of terms of years; so that it must be considered as an universal rule, and the great landmark of the settlement of Real Property.

Now if this be a plain intelligible rule, if it be founded, as it undoubtedly is, on the principles and policy of the common law, if it be such as well accords with the usage and practice of the times, and I am not aware that the converse any where appears; and finally being, as it is, the established law of the land, it will probably be considered the safest course to adopt it, as the guide in any reform of this branch of our law.

If such a rule be so established, it is unnecessary to entangle ourselves with the steps by which it was settled. No rule could be more easily defined; if legislatively defined, it would offer a plain guide, for the extent of every limitation, and every settlement; and if at the same time, all the technical machinery of uses could be removed; it would simply be required, to set down plainly and directly in every limitation, describing known estates and



interests, in known legal terms, *the INTENT of the PARTY.*

It remains only under this head, to consider *Trusts of Accumulation*, where lands are vested in trustees to accumulate the rents until a certain event, a power which is allowed to the whole extent during which lands may be rendered inalienable by the law of perpetuity. Trusts of accumulation were probably unknown until the beginning of the last century; but previous to the famous *Thellusson* case, they had been considered as established, and being in that case solemnly confirmed by the highest judicial authority, it gave occasion to the interference of the legislature, to prevent the repetition of so absurd and impolitic a disposition of property.

Accumulation is now lawful only for a period of twenty-one years, from the death of the settlor or testator, or during the minority of a person living at his death, or during the minority of any person, who, if of full age, would be entitled to the rents; and it is understood that accumulation is authorised for all those periods: The prohibition is expressly declared not to apply to any provision for payment of debts, or for raising portions for children of the settlor, or of any person taking any interest under the settlement.

This interference of the legislature proceeded upon sound principles; a trust of accumulation is directly opposed in principle to the policy of the common law, which required a freeholder in possession; it may be a question whether the first period assigned, of an absolute term of 21 years, ought at all to be permitted; and the saving of the provision for unlimited debts and portions, is so far, an abandonment of the principle upon which the prohibition proceeds; charges might be created under the name of portions, which would carry the accumulation to the full extent of the *Thellusson* case. In any revision of this part of the law, particularly with reference to the powers of trustees and guardians, and to the essential reform requisite in the law of liability of land to debt, the extent of trust of accumulation ought to be further considered.

## CHAPTER XVIII.

### *Terms of Years.*

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THUS far in the inquiry, we have considered land, as distinct in its legal character in every respect, from moveables; but a practice peculiar to the law of England, of creating *Terms of years* out of the fee, and which have become subject to rules distinct from freehold interests, has introduced many difficulties.

The original object of a term of years in land, is merely applicable to temporary beneficial occupation, for the purpose of cultivation, use, or improvement. The common law disregarded such an interest, acknowledging only the first estate of *freehold*, as being the estate in possession; the term subsequently became an established estate, but to the present day it is treated, in regard to the mode of alienation, gift by will, transmission to successor, and attachment for debt, as a chattel, and not as land. The ground of



this distinction, at least, as to long terms of years, is wholly inapplicable. There is no reason why the right to a term should not pass by deed, without entry; or why in a will it should pass by an instrument not executed with those solemnities required for devise of land;—Its quality of passing like a moveable, by a will dated previous to the existence of the testator's right, is one which it ought rather to impart to the freehold interest, than itself to lose. With regard to attachment for debt, and transmission to successors, there is more of difficulty in assimilating the chattel to the freehold interest; because there exists a liability of the chattel interest to debt, which it may not be advisable to yield, and at the same time privileges attached to the freehold which this circumstance is not sufficient for removing; and because the transmission of beneficial terms to the *personal* representative, is a convenience which cannot be abandoned.

A peculiar inconvenience in the practice of conveyancing, arises from *long terms of years* created merely for the purpose of securing and raising money, or other special trusts. These terms not having been permitted to sink into the freehold, when the purposes for which they were created ceased,

occasion inconvenience to an immense extent, affecting every title in the kingdom; and as new terms arise before those previously existing are made to cease, it is an evil which must ever be increasing. It must be sufficient to observe, that every distinct term forms a distinct title, to understand the endless confusion thus introduced and perpetrated.

Under the existing doctrine of *Uses*, a long term of years is the only means of creating an estate in a trustee for the purposes of a trust, consistent with the limitations of the freehold interest; but is there any reason for the continuance of such a practice? The object of the trust has seldom any reference to the length of the term; if lawful trusts are to be declared for the disposal of the profits of land, within the limits allowed by the law of perpetuity, there is no objection to such a term being created, to cease at the expiration of the trust; but with regard to terms for raising portions or other money charges, the practice carries with it this positive inconvenience, that if a sale be necessary for affecting the object of the trust, the term only can be disposed of. The inheritance is in effect charged, and except from the technical rules of *Uses*, there can be no reason

why the trust should not attach directly on the inheritance.

Whether it be a term of years, or whether it be the inheritance, the inconvenience would be the same, if the legal estate be kept outstanding after the purposes of the trust are answered; the object in view is, the continuance of a trustee during the existence of the trust, and the ceasing of the trustee's estate, with the ceasing of the purposes of the trust. Now, this might be as easily effected under the one system as the other; a trust is a personal confidence, and on the death, resignation, or incapacity of a trustee, such persons as the deed or will may designate, might be invested with the power of naming by deed a successor, to whom by operation of law the trust estate may become transferred; and in default of a power of nomination being so given, or being exercised, any party interested should be at liberty to apply to a Court of Equity in a summary way, to have a new trustee named. On the purposes of the trust being performed or becoming incapable of taking effect, the law should declare the trust estate at an end, and the evidence of such a fact, the best that the nature of the case would admit, is no more than even upon the present sys-



tem is requisite for the security of a title. If the trust was direct *for* a particular person, or to pay the rents to a particular person, the law should at once transfer the legal possession to such person; if to convey to a particular person, or as such person might direct, the law should vest the legal possession in the person entitled to such conveyance, or claiming under such appointment; it is not obvious how such a law could be introductory of any injustice, and if not, it would evidently remove much complexity in titles. Indeed it is difficult to conceive, the enormous burthens from which titles would prospectively be relieved by such a law; and with regard to outstanding estates now existing, they offer a case equally pressing for the interference of the legislature.

The present state of the law with regard to outstanding satisfied terms, is at all events one which ought not to be suffered to continue. A term of years having been created for a particular purpose, and that purpose being effected, it is a common practice to assign the term to a trustee, in trust for the owner of the land, and *to attend the inheritance*; the term is then considered as attending the inheritance, but not merged in it; and although every satisfied

term, whether expressly so assigned or not, does by construction of law follow all the limitations of the inheritance, yet upon every sale, mortgage, settlement, or other conveyance of the inheritance, it is deemed necessary for the protection of the persons taking under such conveyance, to assign the term to a new trustee, and thus every term is assigned to a separate trustee, upon every new conveyance. If a person taking a conveyance of the inheritance, neglects to take an assignment of such a satisfied term, any other person who may *bona fide* become entitled to any interest or charge on the land, although subsequent in date, procuring an assignment in trust for him, will be allowed to use this term to gain to himself the preference. On the other hand, any person taking a conveyance of the inheritance, and taking an assignment of such a term, will protect himself against every possible incumbrance of which he has not direct notice, created between the raising of the term, and his conveyance. Of course the practice is, at enormous expence, to keep on foot and continually assign every term.

But the courts of law have lately, in cases in which satisfied terms so assigned, have been

set up as a protection to a subsequent purchaser or incumbrancer, considered the term at an end, by directing the jury to presume, what in fact neither the court nor jury could really believe, that an actual surrender had taken place. This doctrine is not approved in the Courts of Equity, nor adopted as a guide by conveyancers in practice, so that the point remains, and must remain, in a most inconvenient state of doubt, until settled by some decision in the House of Lords, or by legislative interference.

Now under these circumstances, is it not plain, that the present practice with regard to outstanding terms is attended with more of inconvenience than advantage? and assuming that some plan may be devised, for the avoiding the creation of such terms in future, it would be of infinite benefit, if, preserving all existing rights and titles, the necessity or use of any future assignment could be taken away, by a legislative declaration that, *subject to every existing right of benefit or protection from such terms, all satisfied terms, whether assigned to attend the inheritance or not, should henceforth be deemed to be MERGED and EXTINGUISHED.*

The same law might, with equal advantage and propriety, be applied to all outstanding



legal estates in fee. As the law stands, where trustees ought to convey, it would be left to a jury to say whether such a conveyance should be presumed; but the jury could only raise such a presumption, as a legal inference from the obligation to convey, and would not it therefore be much more rational to say at once by law, that where a mere trust estate ought to have been conveyed, it shall be deemed to be extinct.

So far as to satisfied terms of years; terms actually existing for trust purposes, would continue until those purposes were performed, and then cease by operation of law. With regard to existing terms held beneficially, it would be impossible to apply legislative interference; but on the point of permitting in future the creation of long terms of years, it may be a question how far it ought to be permitted. It may be convenient that *bona fide* beneficial leases should pass to successors as chattels, and be saleable under execution for debt as such; but as to long terms of years created without reference to the relation between landlord and tenant, it may not be convenient that it should be left to every individual to assign to his land for ever, the quality of freehold or chattel, according to his own caprice.

## CHAPTER XIX.

### *Forms of Conveyance. Fine and Recovery.—Registry.*

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ASSUMING, what for our present purpose we may admit, that the Forms of Conveyancing now in use, are the best adapted to carry into effect the intent of the party, in accordance with existing principles of law, we can only look to a reform in that practice, from a revision of the law itself. If the forms are faulty, as applied to the actual state of the law, the remedy must originate with the public, and not with the legislature. The point therefore, as far as the present inquiry is concerned is, what improvement in form is attainable by any amendment of the law.

The true spirit of reform in the practice of conveyancing, consists, in the facilitating the power of alienation, by forms proceeding on the simple principle of the direct application of that power to the object in view.

It would be subversive of this principle, to attempt by legislative interposition, to impose any form whatever. At first view, it might appear to be desirable to sanction with legislative authority, certain forms, applicable to the most usual cases, with liberty to the party to use such form as far as it may be applicable; so as to ensure the expression in definite language of the general objects of parties, on the most familiar occasions. But on more attentive consideration, I am persuaded it will appear, more effectually to tend to simplicity of form, that the power of alienation being in every case defined, and the mode of exercising that power freed from useless perplexity, nice distinctions, and antiquated technicalities, every party be left to express his intention, in known language, upon known principles, so as best to effect his object, according to that legal advice, which it must be assumed he receives.

With this view, it has been proposed, by removing the machinery of uses, to reduce all deeds of conveyance to a more simple form; it remains to examine, whether by a revision of the law in other instances, we may not be able in a farther degree to attain this desirable object.

The public are not aware of the direct



and extensive operation of the *Stamp Duties*, on the forms of conveyancing. To a certain degree, by measuring a very inferior part of the duty by the length of the deed, it operates to curtail the form; but in a point of much more extensive effect, it causes an unnecessary and inconvenient waste of words. If it were allowed, to have deeds stamped after execution, and to have them stamped at convenient places in the country, a deed would be frequently indorsed on the preceding instruments, and thus all the recitals of the former transaction saved; it may fairly be said, on an average, that the *Recitals* occupy more than half the deed. The stamps upon leases operate contrary to all true policy, to discourage, and in many cases to prohibit them, and the best interests of the country are intimately involved in an entire revision of that part of the duty.

If the recitals occupy one half of a deed, it may fairly be said that, clauses of *Common Form* constitute the larger proportion of the remainder. With regard to *Covenants for the Title*, the form has been in use for a long period, and its effect is thoroughly known. The intent of these covenants might be expressed in a much more simple form, and as to such parts as are of universal obliga-

tion, such as to make further assurances, the obligation might be defined by law, and be made inherent in the conveyance. It has been proposed that such a guarantee should in all cases be, by force of law, absolute, unless otherwise expressed; but this would not effect much, because the general practice and consent is, that it should be qualified.

It would certainly tend much to simplify conveyancing, if some rule in this respect, agreeable to that which is sanctioned by existing practice, were confirmed by law; the rule is well known, and in effect would be,—that a person granting land to be held under the grantor, would absolutely warrant the title, but a person merely transferring an interest would guarantee the title, only against all persons coming in by title since the last guarantee, so as to keep up a continued chain of warranty; the law might also continue the benefit of such guarantee to all subsequent claimants, restricted to the amount of the original consideration paid to the person to be bound thereby;—there would be difficulty and nicety in framing such a law, but there is nothing in principle against its being done, and the benefit would be extensive.

The policy of the law requires facility of



alienation, by the easy division and reunion of land. *Muniments of title* must remain with one proprietor, but all parties interested ought to have access to the means of using such documents. This is now very imperfectly effected by a covenant to produce the title deeds, an omission of which leads to frequent embarrassing objections to a good title, which there may be no means of making marketable. It would be too much to declare by law, that the proprietor holding the deeds, shall in all cases be bound to produce them to every person deriving interest under the title; what deeds are to be produced must depend on the contract of the parties; but an attested copy, granted or acknowledged by the proprietor in fee, and specifying in such grant or acknowledgment, the lands in respect of which it was granted, might entitle the possessor, to demand production of the original deed, against all into whose hands such deed should pass.

I have already alluded to a general provision for the appointing succeeding *Trustees*, which, if adopted, would much simplify the provisions now inserted for that purpose, in every trust deed; and it is highly desirable that the liabilities of trustees should be better defined by an express law, and



that a class of persons, to whom the country is so much indebted, should be left with regard to their indemnity, neither to the caprice of the party, the negligence of the practitioner, or to the present too strict rules of Courts of Equity. It only remains to observe on this head, that a clause universally inserted in all trust deeds, directing that the receipts of the trustees for money payable under the trusts shall be effectual, ought to be at once declared to be the law.

With regard to *Mortgages*, the present mode in which land is charged with debt, or made liable to the raising of money, is much more complicated than the case requires. The object is simply, to pledge the land, to permit the mortgagor to remain in possession until default, and then to entitle the mortgagee to enter and dispose of the land for payment of the debt, or at his option retain it as his absolute property, *after due notice* to all parties entitled to the benefit of redemption. Whatever tends to give the mortgagee a direct and easy remedy for his money, guarding against hasty and improvident sales, must ultimately be for the benefit and protection of the landed proprietor; the present law and practice do not adequately protect the mortgagee, and lead to much intricacy and perplexity in all mortgage

transactions. Powers of sale are almost universally inserted in mortgages, but so various and undefined, and it is so difficult by any agreement of parties to give to the mortgagee a power which shall to a purchaser's satisfaction guarantee the title against the mortgagor and subsequent claimants, consistent with the fair right of the persons entitled to redeem, to due notice ; and it is, as a matter of general policy so desirable to make mortgage transactions *sure* ; that this is peculiarly a case wherein the interference of the legislature would be salutary. By facilitating a sale, justice would be ensured to all, and the tedious process of foreclosure superseded ; some *judicial* check on such sales may be necessary, but it would entirely defeat the object, if it were not made as simple as possible. The only purpose of judicial check, is to authenticate the notice of the sale ; the time and conduct of the sale should rest entirely with the party. Persons claiming by acts subsequent to the mortgage, should only be entitled to notice, upon a proper specification of their claims, within a limited time after public notice of sale.

In respect to *Leases*, there are many points in the law of landlord and tenant which require revision. The law of Emblements, to the



extent it is allowed, is unjust; at the same time the principle, under better regulation, might with advantage be made more generally applicable to a change of tenancy. The power of distress, although it has repeatedly undergone legislative regulation, is still defective; it is not sufficiently protected against fraudulent replevin, or made available as it ought, in every case where the relation of landlord and tenant subsists.

There ought to be an universal apportionment of rents in case of change of the landlord's interest, and it would be equitable that there should always be a right in the tenant of the land, in case of eviction by title anterior to the lease, to hold to the expiration of the year, and then to be paid for his crops by a fair valuation.

The legislature has invested tenants in tail, and husbands in right of their wives, with powers of leasing to an extent, beyond perhaps what may be necessary for beneficial occupation; but as far as is convenient for that purpose, it would be right that tenants for *life* also, should be invested with such a power. It is usual in settlements to give to a tenant for life, some power of leasing, and it may prove very convenient to give by law a power to a limited extent.



All modes of alienation, ought to be reduced to one general form,—that of A DEED. The *Fine* and *Recovery* involve needless intricacy, delay, and expence. The peculiar force of each of these species of conveyance, may equally well be obtained by deed. The principle on which a fine creates a title within the short period of five years, is indefensible, upon any ground of policy, justice, or convenience. If it be proper that it should be competent to a party notoriously in possession, by some act judicially authenticated, and recorded, to acquire, after a fixed period, a title against all the world, the period of five years should be reasonably extended; and then, whether the act be a Deed Enrolled, or a Final Concord acknowledged, is very immaterial. Whatever be the act, it may be invested with the legal force of a fine, but it should not be restrained to be passed only in term time, or to be acknowledged before special Commissioners. A fine is commonly used as the mode of conveyance by a married woman, on the ground that she is solely examined, and consents separately from her husband; It is fit that this caution in substance should be preserved, and it would be much more effectually so, if her consent to a deed was taken before some judicial officer.

The recovery involves much more expence than the fine ; it is proper that the act by which the entail and remainders are barred, should be solemnly and judicially recorded ; but it is contrary to policy, that the act should be restricted to the Term ; and it is time that a form so entirely devoid, as a form, of any rational foundation, should be abolished. The legislature has already in many instances given the effect of a recovery to a deed enrolled, and in some cases to a mere recorded consent in Court.

I shall conclude this part of the subject, with the important and long debated point, of the propriety of a *Public Registration* of all deeds. No such principle is to be discovered in the common law ; the livery on the land, the entry under the lease, and the attornment to the reversioner, only proceeded on the ground of notice to the lord or tenant of the change ; it did not publish the contents of the charter to the whole world. Nor is it desirable that such a principle should be adopted, because it is directly subversive of that freedom of alienation, and uncontrouled dominion over property, within the limits of the law, which it is the best policy to protect. It will be obvious to every proprietor, that except so far as a public registry may be



requisite for protection of purchasers from secret incumbrances, it is in itself a very inconvenient incumbrance.

Now it is not in fact any such protection; an obligation to register must proceed on one of two principles; either that an unregistered deed shall be of no force, like the statute of inrolment of a bargain and sale, or that an unregistered deed shall be valid except against subsequent deeds registered, which latter is the principle on which the Register Acts for the counties of York and Middlesex proceed. But Courts of Equity have decided that *Notice* of an unregistered deed shall stand in place of a registry, and have thus entirely neutralized the peculiar force and spirit of the law, and left only its useless form, expence, and complication. In France, and many Foreign Codes, both the deed and will are required to be notarially or judicially acknowledged; with us, the authentication of the deed is left entirely to the free-will of the party, and it is to the honor of the Nation, that it may be so left without inconvenience. This is not the time, in which the complicated and expensive plan of public registration ought, as a general system, to be introduced.

The transfer of the title deeds does in



practice stand in place of a register, and if such transfer were made a security against all incumbrances, not publicly registered, the system would be complete. There is at present no general register, but that of judgments and life annuities; if the same principles were applied to all settlements and charges, not accompanied with possession of the deeds, every good effect of a register would be obtained. The fact is, that the practical evil from want of a general registry is rare, but still it becomes the legislature to look to the principle, and to establish Equity on the firmest basis.

With regard to *Wills*, the rules which confine the operation of the will, as to lands, to property possessed by the testator at the time of making the will, and makes any alienation, though merely formal, subsequent to the date of the will, a revocation, rest on purely technical grounds, and there ought to be no hesitation in declaring, that the will should be considered as to lands, as well as money, as the last act of the testator.

It would be a great convenience, and for the general benefit of real property as well as of incalculable advantage to the public in regard to all property, if all wills were

consolidated in one general registry. The several ecclesiastical jurisdictions might remain untouched. It would only be necessary to direct an authentic copy to be transmitted to an office in London, which might conveniently be connected with the Prerogative Office there.

I have adverted to the equitable doctrine of mortgage, by *deposit of title deeds*, without other act of alienation; upon every principle of sound policy, so indefinite mode of charging lands, ought not to be admitted. The simple rule of alienation by deed, and by deed alone, ought to be strictly observed.

The idea suggested of a public *registry of pedigrees*, in regard to title to land, is open to the same objection, as that to a general registry of deeds. The proposal of compulsory *partition*, through the powers of the Quarter Sessions, would be obviously objectionable, but the present mode of obtaining partition through the machinery of a Court of Equity, might be made more easy and practically useful.

## CHAPTER XX.

### *Copyholds—Coverture—Infancy.*

#### COPYHOLDS.

THE relative rights of lord and tenant in copyhold land, are as sacred as any other property. If it be deemed fit, that land of copyhold tenure should cease to be subject to those peculiar qualities, by which, whether deemed privileges or the reverse, it is at present distinguished ; so far as such qualities affect the public, it is competent to the State to annul them ; but as to all matters affecting the relative rights of the proprietors, the only legitimate ground for legislative interference, is the more beneficial regulation of those rights, so far as it can be effected by any general provisions ; leaving it to the parties themselves by their voluntary act to put an end to the tenure by enfranchisement.

The peculiar character of copyholds, with more immediate relation to the present in-



quiry is, that all alienations pass in the manor court; the record there has the effect of a registry, and the forms are simple and might easily be adapted to all circumstances. The tenant may surrender, to any use or intent, so it be in accordance with the nature of his rights, under the particular custom of the manor; and by the lord's admission, or acceptance and regrant, the transfer becomes perfect. The inconvenience of this mode of alienation, arises from the complication introduced by the desire to adapt the usual limitations and purposes of settlement, sale or mortgage, to the peculiar customs of the manor; but so far as the purpose to be effected be within the extent of the tenant's interest, there would be no objection in principle, to the adopting forms of conveyance at common law.

At present the tenant covenants to surrender, by a deed in which the intended provisions are inserted, and so far as these are compatible with the custom, they are perfected by surrender and admission; so far as they are not so, the object is effected by the medium of a trust, and the trustee becomes the tenant on the roll. The act of surrender and admission may each be done by attorney, either in court, or before the lord, his steward or deputy; but in all these particulars, merely formal as they are, the custom

must be observed. Thus, although the tenant's right of alienation be absolute, the convenient exercise of it depends on the will of the lord, who probably cannot be compelled to accept a surrender out of court, or to record an admission by attorney, or to enrol trusts, or the steward to appoint a deputy to attend a tenant to whom personal appearance may be inconvenient or impracticable.

Now, although there be no sufficient ground for abolishing the tenure, there can be no objection to the making the actual exercise of the respective rights of the parties more convenient; the legislature has on that principle authorised infants and married women to be admitted by attorney; and supposing the beneficial rights of the lord to be duly guarded, considerable convenience might be conceded to the tenant, by authorising his alienation by deed, to be enrolled in the records of the manor. By this means the inconvenience of trusts might be avoided, and the more complicated plan of making a lease under licence from the lord; any direct alienation might be authorised within the limits of the copyholder's interest, and by the necessity of enrolment, the lord's fines be secured; the additional value which would accrue to the property from such increased facilities, would

be participated by both parties. It might be further desirable to authorise the lord for the time being to grant by deed enrolled, any interest within the limits of the custom, reserving not less than the usual rents and services, but with any further convenient stipulations for the benefit and improvement of the land, and without any restriction as to the division or consolidation of copyhold tenements.

Such a measure would probably be accompanied by the assimilation of freehold and copyhold property, as to all public rights, privileges, and liabilities. There is no ground in principle, why copyhold land should be exempted from attachment for debt, or why the copyholder should not be entitled to the privilege of an elector. Thus a gradual enfranchisement would be ultimately effected without violence, and without that direct legislative interference, which is not agreeable to the spirit of the constitution.

#### COVERTURE.

THE relative rights of husband and wife, particularly in regard to the property of the wife, are not at present settled upon uniform



and satisfactory principles. With respect to Dower, it has been suggested, that the right should not attach to land acquired after marriage. The law allows the wife, on marriage, to accept a jointure out of *land*, in bar of dower; it would be convenient to extend this to personal property. But the part of the marital law, which calls more peculiarly for attention, is that attaching to the property of the wife.

The law, in regard to the landed property of the wife, is, that the husband gains the use and beneficial enjoyment of the land during the coverture, with a life interest in case of issue, and with power of leasing under particular restrictions, but the inheritance remains to the wife. The wife however is considered competent to consent to the alienation of her lands of inheritance, as well of her right of dower, and of her jointure; the mode of taking that consent is by fine. Any agreement made before marriage is binding, in regard to the whole property of both parties, present and future, so far as the parties are of full age to contract.

The principle of the law, as to the real property of the wife, appears to be,—sole beneficial enjoyment to the husband during coverture,—power of alienation during coverture, with

joint consent of husband and wife;—reservation of the dominion to the wife and her heirs. This principle of the Common Law is simple and just, and much preferable to the refined distinctions which mark the law which has been raised by equitable decisions, in regard to personal estate.

A settlement before marriage, is the law of property for parties; but in the absence of a settlement, all the chattels of the wife in possession, during the marriage, vest absolutely in the husband; such is the general principle, but the exceptions are involved in nice and intricate distinctions. The general rule comprehends all personal property which is in possession, or which the single act of the party can reduce into possession, and includes terms of years in land; the exception includes all such personal property as lies in action, and requires some exercise of right to reduce to possession; such as a debt which may be recoverable only by a suit at law, money in the public funds which requires an actual transfer, or property in trust, or otherwise under the controul of a Court of Equity, or any property in reversion or on a contingency. Such property belongs to the husband if he reduces it into possession, during the coverture,



otherwise it survives to the wife, passing however to the husband surviving, as entitled solely to the beneficial administration of his wife's property, in exclusion of her own relations.

It would be out of place here, to go into the refined distinctions arising on things in possession or action, and the acts which amount to a reduction to possession, and the rules of equity which require the husband, calling in Equity for his wife's fortune, to make a settlement, before the property be transferred to him; the doubts and intricacies arising from this source are such, as to involve family affairs in much needless vexation; they affect all ranks and all properties, and from their nature are such as to attach frequently on fortunes, which an appeal to equitable decision, would entirely absorb.

Property may be secured on marriage, or given afterwards to the separate use of the wife, and she may be restrained from parting with it during coverture, or the full power of alienation may be assigned to her, according to the settlement or will of the donor; subject to such restriction, she becomes the absolute owner. Real property can only be secured for her benefit during marriage, by a trust for her separate use. Now, if the principle be just and convenient, that a married woman should have



the dominion over separate property, and it is what all laws have allowed, it would be better at once to admit her to the free exercise of such a right without the intervention of a trustee. As to all personal property of the wife, not secured to her separate use, however equitable be the system by which it is governed, the ultimate rights of the parties depend on accident, and it were more desirable that the consent of the wife should be made, simply, necessary or not necessary in every case. The rule in substance appears to be this, that the husband alone has the absolute power during the coverture, and the absolute property if he survives, leaving to the wife surviving, all that he has not alienated; it would be more convenient, if it were declared, either that no alienation of the personal property of the wife should be valid without her consent by deed, or that the *jus mariti* should attach on all her personal property, — giving the wife a title by survivorship to all that is not alienated during the coverture, and a right of disposition by will.

The intricacy chiefly arises from the antiquated distinction of the *choses in action*, from other personal property; the maxim, that an action cannot be assigned, is destitute of all sound principle, as applied to the present

state of society, and is most inconvenient in practice, without a single advantage to counterbalance it. A bill or note may be assigned by delivery, any debt is in effect permitted to be assigned, but in a circuitous way, admitting of its being sued for only in the name of the original creditor; now it is difficult to say, what possible objection there can be to this being effected in a direct way, and why any debt, evidenced by writing, should not be assignable by delivery and endorsement of the security, with notice to the debtor. Such is the law in France and Scotland

#### INFANCY.

There is no point in which our law is more defective, than on the interesting subject of guardianship. The common law was peculiarly solicitous to provide for the care and custody of the person and estate of the Infant, but since its provisions arising out of tenure have ceased, no adequate substitute has been provided. The Court of Chancery, in the exercise of its general jurisdiction over infants, offers the best ultimate security for the care of the infant's person and property, and the best means if properly applied, of providing proper guardians to

superintend the education of the infant and the administration of the affairs. But that the person and property of every infant should be left to the care of the Court of Chancery, under its present rules of practice, is a system much too inconvenient to be continued.

The common law assigns no guardianship except in respect of *land* held by the infant by *descent*, other than the custody of the *persons* of children, which under the age of *fourteen* is assigned to their parents as their *natural guardians*; it was only as to the *heir apparent*, that the law committed to the *father* the custody of his person until twenty-one, even against the guardian in chivalry. As far as regards personal property, the common law made no provision, neither did any guardianship attach by law in respect of land not taken strictly by descent, nor as to the person or land, except in the case of the father over the heir in chivalry, beyond the age of fourteen. Except in the character of guardian in socage, over the socage land by descent, the guardian in chivalry having ceased, there is not at the present day any guardian by the common law over the property of the infant. The legislature, seeing the inconvenience of this state of the law, by an act of Charles the second, authorises the father by deed, or will, to name guardians for his children until



twenty-one, and gives to such guardians, to the use of the infant, the profits of the land, and the management of the personal estate, investing such guardian generally with the authority of a guardian in socage.

Now it appears to be very uncertain what powers, if any, the guardian in socage had over the personal estate, and it is thus left at present so unsettled, what powers the testamentary guardian is invested with, the only guardian whose office extends to the age of twenty-one, that practically, the guardian either acts on his own responsibility, or must consign the management to the Court of Chancery.

The inconveniencies arising from this defective state of the law, are of daily occurrence, and the groundwork offers so obvious a remedy, that the matter deserves the best attention of the legislature. The civil law assigned a *Tutor* to the child until the age of fourteen, and a *Curator* to the age of twenty-five; both tutor and curator were either appointed by the father, assumed by the relations, or named by the judge; the office was obligatory, and both tutor and curator might be required to give security. The modern law of France proceeds on the same principle, assigning it to a family council to nominate and assist the guardian; and the

law of Scotland adopts a similar system, each law minutely detailing the powers and obligations of the office. At the age of fourteen, it is said, that by our law, the minor may choose a guardian ; but the mode of carrying such a purpose into effect, and the powers with which the office is invested, are so indefinite, unless the choice be made through the Court of Chancery, and the office executed under its controul, that the latter is the only mode, which, in default of the father's appointment, or on failure of the guardianship so appointed, can practically be adopted.

Under these circumstances, no doubt can exist, as to the propriety of some legislative interference ; the powers of the Court of Chancery, if made conveniently available for all cases, in all parts of the Country, are admirably adapted to the purpose ; but those powers should be applied only to name the guardian, and to give the ready means, where necessary, of passing his accounts, without farther involving the concerns in the administration of the Court. The machinery ought to be adapted practically to the object, and not the object sacrificed to the forms. The general powers and obligations of the guardian, in whatever way appointed, should be defined by law, upon a principle to induce the fittest persons to undertake the office.

The advantages to be expected from some general system of appointing guardians, are many ; the infant himself, or any relation or friend, should be authorised to apply in the most ready, convenient, and inexpensive mode for a judicial appointment ; the rules to guide the conduct of the guardian, founded on existing principles of law, should be made more definite, and practically useful, by legislative revision ; gifts might then be made to infants, without the intervention of trustees, and the fittest person, when duly protected by law, would be willing to undertake the office. Nor would the advantages be confined to the infant. An infant sued at Law or in Equity may at present demur, and delay the proceeding, until he comes to the age of twenty-one, a privilege which was not extended by the Civil Law beyond the age of fourteen, and which to the extent allowed by our law, is very inconvenient. If a proper guardian were always ready to protect the right of the infant, this rule might be relaxed, to the manifest advantage of creditors, and the convenience of the public. The office of guardian is one, which if duly filled would facilitate every transaction, and simplify the law of infancy altogether, to a degree, which could not be duly appreciated, until the experiment were fairly tried.



## CHAPTER XXI.

*Liability of Land to Debt.*

I AM well aware that this is an important and difficult part of the subject, but it is one which will force itself on the attention of the legislature. The whole law of the administration of assets is so full of anomalies, and so impeded in its practical application by conflicting principles; it is a subject of such universal interest, and so interwoven in every transaction of life, and applicable to all degrees; that it is impossible to enter upon any practical reform of any part of the law of property, without a complete revision of this part of our jurisprudence. The liability of land to debt forms the immediate object of the present inquiry.

The principle adopted in our law is, that the moiety of the profits of land may be attached for debt on judgment, until payment of the debt; and that after the death of the

debtor, the heir or devisee are liable only to debts secured by a special obligation under seal in which the heir is bound to the extent of the value of the land descended or devised. The same distinction obtains between debt by specialty, and debt by simple contract, in regard to the personal estate of the deceased debtor. Debts by judgment and debts by specialty, are to be paid in preference to simple contract debts, as far as regards all property which vests by law in the executor or administrator, and is termed *legal assets*; but in respect to such property as can be obtained only by aid of a Court of Equity, it is called *Equitable Assets*, and is divisible without preference, amongst all the creditors; in this class is included every thing which the debtor may have made subject to his debts generally, and which without his act would not have been so subject.

Amongst debts of the same degree, the executor or administrator is entitled to *retain his own debt in preference*, and to *prefer any one creditor to another*, and this even after suit commenced; and he is entitled to sue, without being liable, in case of failure, to *costs*. In all these particulars, the law rests on no sound principle, and merely opens a door to injustice, without any good

end obtained. The creditor by any specialty may sue the *heir*, who is liable to the extent of lands descended or devised, but the *devisee* is liable only on a bond and not on a covenant.

Founded on a general maxim of Equity, arises a rule, by which *assets are marshalled* so as to effect an equal distribution; and specialty creditors, having a right to resort to both real and personal assets, are compelled in favor of simple contract debts to resort to the former; so that if specialty creditors take satisfaction out of the personal estate, the simple contract creditors will stand in their place for obtaining satisfaction out of the land.

The principle in following property for debt, both during the life time of the debtor, and after his death, is to attach personal estate in preference to real. The personal estate of the deceased debtor is in general bound to exonerate the real, and in execution upon judgment, the creditor must take the goods before he takes the lands, or he loses his remedy against the goods altogether.

A judgment is so far a *lien* on lands from the time of its being recorded, that if enforced during the life time of the debtor, it attaches on a moiety of all lands of which



the debtor is seised at the time of the judgment, and extends to lands held in *trust* for the debtor, but not to *copyholds*; it attaches on chattels only from the time of execution, including terms of years, but cannot reach terms held in trust. If lands be mortgaged, to any extent, however inconsiderable, the property is privileged from execution; after death, the judgment may be enforced against the heir and devisee, to the extent of the lands descended or devised.

Now under these, the existing principles and rules of law, the point of the inquiry is, what is the inconvenience, and what the most effectual remedy,—that land should be distinguished from personal estate in respect to attachment for debt, and should not be resorted to, until the latter be exhausted, is perfectly reasonable. How far land should ultimately in all cases be submitted to alienation for debt is matter of grave consideration and serious enquiry. In the administration of assets, personal property of every kind is considered as first applicable, before resort is permitted to the land, but in regard to attachment for debt, in the life time of the debtor, it is only the mere *moveable* property that can be taken at all. It cannot be just or politic to submit lands to be alienated for debt, unless

every description of personal property be also made so applicable ; and therefore until all personal estate, until *choses in action* be made generally extendible, no alteration can with propriety be made in the law of liability of land for debt.

Execution upon judgment, as against land, gives the creditor the possession, and profits only, until the debt be paid, not a power of sale. The liability of the heir and devisee, upon the same principle, is only personal in respect of the land, and does not attach on the land itself. No direct charge upon land can in general be created but by the voluntary act of the proprietor by his deed or will ; the only exception in the Law of England arises out of the bankrupt laws ; and in conformity to the same principle, the legislature has lately declared that the *real property of every trader* shall on his death be liable to be administered and disposed of in equity for payment of all debts, but the preference of the specialty creditor is still preserved.

The simple and just principle appears to be ;—that *a creditor pursuing due diligence, should be entitled to attach every description of property* ; and when we consider the various modifications to which land may be subjected, and the complete power of alienation which



the debtor possesses, up to the time of the judgment, it will be obvious that nothing short of a *sale of the property* under proper judicial regulations, can effectually answer the purpose of the diligence. In case of land, there can be no objection to the giving to the debtor a reasonable time, after judicial notice, to redeem the property; but subject to some reasonable restriction of this nature, the time appears to be arrived, when all landed property ought to be freely submitted, in conjunction with personal estate, to be sold for debt.

In case of *outlawry* upon non-appearance of a debtor, the law at present allows all personal estate, including choses in action, to be extended, in the same manner as in case of an extent for the debt of the crown, and it is an easy step to apply the same principle to every execution. In Scotland, non-appearance makes all the debtor's property liable to be seised and sold, as in case of bankruptcy; it would be reasonable and just, if our process to outlawry in similar cases were rendered more easy and expeditious.

So far, as to attachment of the debtor's property in his life time;—at his death, the reason is much stronger for submitting all his property to the discharge of every de-



mand. The complication and consequent delay, expence, and litigation, occasioned by the contradictory rules of law and equity, as to the application of assets, is a source of much more extensive inconvenience than is made generally apparent to the public. There are two simple rules by which all this complication and inconvenience might be avoided; *every debt ought to be placed on equal footing, and all property be made equally liable, to be applied in the order at present directed by law.*

The distinction between debts acknowledged by writing under seal, and those not so acknowledged, termed debts by private contract, does not rest on any sound basis. The difference as regards the remedy against the debtor in his life time, is none at law, except in the technical form of the action; but as against assets, the difference we have seen is essential, giving to the specialty debt not only a larger fund to resort to for payment, but a preference over other debts, even in the administration of the same fund. At common law there was no remedy against an executor for any debt by simple contract; an executor could not have the advantage of the legal mode of defence in such cases by *wager of law*; and it is only by an equitable application of a fictitious form of action at

the present day, that any such debt is recoverable at all. It was probably only from this circumstance, that the rule of preference arose; at all events it ought not to be continued.

The law which makes the judgment a lien on lands, although not followed up by execution, causes an inconvenient clog upon property, without any adequate advantage. No principle of justice demands such a lien, unless followed up by diligent execution; the process of execution should be made every way simple and effective, but if not adopted with all diligence, the judgment should not operate as any incumbrance on the debtor's property. In case of voluntary confession of judgment, there is every reason against such a lien, the present rule of equity of tacking judgments to mortgages, so as to oust mesne incumbrancers, ought no longer to continue; but as long as it does, it is an additional reason for barring the judgment, unexecuted within a very short period.

Upon a similar principle, the lien of the creditors on the lands of the debtor after death, ought to be complete, for a short limited period after public notice, and then to be at an end; and the mode of converting such property for the payment of debts, ought to be simple and plain, so as

to give the creditor an easy remedy, and the purchaser a clear title.

Upon these grounds it is submitted, that the law of attachment of land for debt, and of preference of specialty debts, and with it *the whole law of ADMINISTRATION OF ASSETS, demands thorough revisal and reform.*



## CHAPTER XXII.

### *Title by Prescription.*

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THERE is no point more important, in its bearings on the law of real property, than that of *Title by Prescription*; and however rare in fact may be the instances, in which a title is acquired by length of possession without right, yet the rules by which this part of the law is governed, necessarily become a principal land-mark in the consideration of every title.

The principle of the Law of England is, that *no prescription in lands makes a right*; as to servitudes incident to land, such as a right of way, of light, water, or common, an adverse uninterrupted user for twenty years, constitutes a title; but as regarding land, prescription is merely *negative*, by length of time barring the remedy. Nor would it be just, where the law admits of limited interests in land, that any principle of prescription

should be applied, which will not admit of each successive right being asserted when the succession takes place ; but the law may with justice limit some certain time, within which the claimant ought to shew, himself or those under whom he claims, to have been in possession, and within which he ought to be held to pursue his remedy.

By Statutes of *Henry* the third, and *Edward* the first, fixed periods of limitation were assigned, beyond which no seisin could be alledged in any real action ; by the latter the period fixed, was the reign of *Richard* the first. But by a Statute of *Henry* the eighth, a definite period of limitation is assigned, applicable to all times ; by which no person shall have any action grounded on his own possession above *thirty* years before the action brought ; or *any writ of assise* grounded on the possession of his ancestor, but only on a possession within *fifty* years ; nor any *writ of right* grounded on the seisin of his ancestor, but only on such a seisin within *sixty* years.

The writ of right is the highest remedy ; a recovery in writ of right gives an absolute title, and under this statute no person can now avail himself of such a remedy, and consequently is without remedy, unless he can

shew an actual seisin, by taking the profits by himself or his ancestor, within *SIXTY years*.

By a statute of *James* the first, no person can avail himself of the remedy by writs of *formedon in descender, remainder, or reverter*; that is, where he claims by form of the gift, as issue in tail, or in remainder or reversion, except within *TWENTY years*, next after the title and cause of action to him first descended or fallen; and no person shall make any *entry* into lands but within *twenty years* next after his right or title first accrued. Under the former clause, a tenant in tail must bring his *formedon* within twenty years after his right accrues, or he and his issue are for ever barred. The person in remainder is allowed twenty years after the estate tail ended, unless the tenant in tail, by some tortious conveyance, by some wrongful act of alienation, *discontinues* or divests the estate in remainder, and then he in remainder must pursue his remedy within twenty years after such discontinuance. By the latter clause, the right of entry, or right of possession, is absolutely barred by twenty years adverse possession. Twenty years adverse possession gives a positive right of *possession*.

By the statute of *Henry* the seventh, *finis* bar all persons who do not pursue their



claims within five years after the fine levied, or in case of any title accruing subsequent to the fine, within five years after their title first accrued.

By a statute of *Anne*, no entry is sufficient unless an action be commenced upon such entry within one year;—The proper action to make good a right of entry, is *Ejectment*.

It will be necessary to mark and distinguish the principles, upon which the several statutes of limitation proceed. The statute of fines ascribes to a particular form of alienation a peculiar effect, from its supposed solemnity and notoriety. The statute of Henry the eighth fixes a limit, within which actual possession must be alledged and proved either in the claimant or his ancestor. The statute of James assigns a limit within which every right of entry shall be sued next after the title accrued. The latter is the only sound principle of limitation; the true question is how long has the person who has the right neglected his remedy, not how long since, he or his ancestor were in possession.

No person is barred by these statutes of limitation unless he is out of possession, and no person can take advantage of the statutes, unless his *possession* is *adverse* to that of the person who claims against him. In this

respect, the possession of the tenant under a valid lease anterior to the title of either party, is the possession of him who is the rightful owner; the mere receipt of rent by wrong may not be an adverse possession at law, however it might be so regarded in equity. So also the possession of the cestui que trust would under general circumstances be deemed consistent with, and not adverse to, the right of the trustee; and the possession of one joint tenant, tenant in common, or coparcener, is not adverse to the others; nor in case of a forfeiture of an estate for life or years, would a subsequent claimant be bound to take advantage of it,—he may wait the natural expiration of the estate.

These statutes of limitation do not extend to the crown, or to the church. By a statute of George the third, the claim of the crown however is barred, unless the property has been *in charge*, within sixty years. Ecclesiastical persons, being restrained by alienation by positive statutes, cannot bar their successors by neglect; were it otherwise the life possessor would in effect have the power of alienation, and the restraint would become nugatory. It would be impossible to give to a property of the nature of tithes

in possession of the church, an adequate protection, on any other basis.

I observe with unfeigned regret in such a work as that of Mr. Humphreys, that tithes are designated, "a litigious and most "impolitic servitude on land." It is only in reply to such an expression, that I feel it my duty to protest against such a description of this ancient endowment of our church. Were this the proper time and place, it would be easy to demonstrate, that tithes have no operation injurious to agriculture, and are as sacred a property as any which can be submitted to the protection of the law ;—indeed, such an expression is as little founded on a candid examination of facts, as it is calculated to be mischievous in its effect, and is equally subversive of the plain rules of justice, and of every principle of enlarged policy.

By the several statutes, there are savings of the rights of persons under certain disabilities ; infants, married women, persons *non compos*, imprisoned, or out of the realm, who are enabled to pursue their remedy,—under the statute of Henry the eighth, within six years,—under the statute of James, within ten years,—and under the statute of Fines,



within five years, after their titles first accrued; but if the time once begins to run, no subsequent disability will avail.

The statutes do not expressly extend to *equitable estates*, but Courts of Equity adopt the principles established by them, as positive rules applicable to all analogous cases in equity. Thus where a mortgagee has been twenty years in possession without acknowledgment of the right of redemption, that right is barred. How far fraud in the possession, by concealing a deed or otherwise, may prevent the statutes of limitation attaching does not appear to be clearly settled.

But in the late great case of *Cholmondeley and Clinton*, the Court of Chancery considered the party who had neither been in possession nor received rents for twenty years, to be absolutely barred in equity, and not entitled to a discovery and production of title deeds, so as to pursue his remedy at law.

Courts of Equity then, as to all *equitable titles*, embracing as they do a large proportion of real property, take no notice of the statutes of limitation as to *real* actions; equity treats twenty years adverse possession, or receipt of rents, as a title;—is there any sufficient ground in principle, why this rule, if just, should not be adopted as universal?

The simple and beneficial remedy open to every claimant, is the action of *ejectment*, founded on a right of entry not barred by twenty years adverse possession; the remedy by *real action*, is involved in so much nicety and difficulty, and its being available to any claimant, depends so much on peculiar circumstances with regard to the claimant's title, that in practice it is nearly extinct; it is well worth consideration, how far the continuance of this remedy, and the subtle distinctions which this part of the law involves, is of any such adequate advantage to persons whose right of entry may have been barred by the twenty years adverse possession, as to compensate for the doubts which are thereby thrown on titles.

The action of ejectment is in form a fictitious proceeding; the effect is, that a person having title to the possession recovers possession against every person who cannot shew a better title. It does not however determine the *right*; it confers no title; we have seen that twenty years adverse possession, is of itself a title to the possession, but a recovery in ejectment confers no title. Ejectments may continually be brought again, by either party failing, without other limitation, than that depending on the twenty years possession.

The ejectment is open, to every person, to recover possession, but the *right* remains undecided. Twenty years adverse possession confers a right to *possession*, but leaves the right of property open to be litigated in a real action. It is not however only after twenty years possession that the claimant is driven to a writ of right, nor is every claimant having right, entitled to such a remedy. There are technical means by which a person having a title to the possession, is barred *within* the twenty years, of his right of *entry*, and of his remedy by ejectment; and there may be those who have a good claim to the property, after the right of entry is barred by time, who cannot avail themselves of a writ of Right.

It will not be attempted here, to enter into an explanation of the different writs by which the right was asserted in a *real action*. It is sufficient to say in general, that every person claiming the *freehold* could by this means assert his right, against a person adversely in possession of the *freehold*, and the judgment was to recover the land, and ultimately give a permanent right. The trial is not by jury, but by the *Grand Assise*, and the forms are such,—*Essoins*, *Vouchers*, *Infancy*, and other dilatory pleas,



are so largely allowed,—that the defendant, it is said, has the power of delaying an issue for several years; it is not only in modern days that the law's delay has been the subject of complaint, and it is possible we may not be inclined to join with Lord Coke in lamenting the disuse of these proceedings. If the demandant claims by descent, he must allege and prove a seisin, an actual possession, in himself or his ancestor, and he had his writs of *Ayel*, *Besayel*, and *Cosinage*; if he claimed as issue in tail or in remainder, he had his *Formedon*; the law invented a writ to answer every case in which a legal right existed; but as they had all been adapted to the state of the law previous to the power of devising by will, there was *no writ for the devisee*; so that, contrary to all the principles of the law, there is no remedy in a real action at the present day, for any person claiming under a devise by will, who has not by himself, or his ancestor, in the strict sense of the word, been in actual possession under the devise.

Thus we see that it is not every person who has the right, that can avail himself of the remedy by real action; and on the other hand, it may happen that a person who has a good title to the possession may by

circumstances, which in justice ought not to affect him, lose his legitimate remedy for recovering that possession. If a tenant in tail, having no right to defeat him in remainder, except by common recovery, alien in fee by *feoffment*, such a wrongful act has the effect of divesting or *discontinuing* the right both of issue in tail, and of him in remainder; his *fine*, which would absolutely bar his issue, would discontinue the estate in remainder. This *discontinuance* would deprive the issue or person in remainder of their right of entry, and put them to their real action; so again, if a mere tenant for life, or a *disseisor*, a perfect wrong doer, should alien by feoffment, and the alienee should die seised, the *descent* to his heir would take away the right of the true owner to enter, and drive him to his remedy by a real action.

It is true these are cases not very probable to arise, and with regard to the effect of a descent to take away entry, the modern equitable fiction, that the true owner may *elect* to consider himself, to have been, technically, *disseised* or not, may prevent its effect of barring the remedy by ejectment within the twenty years; but these are rather reasons for an amendment, than for a continuance of this part of the law.



Although the proceeding by ejectment has in practice superseded that by real action, yet the latter may still be resorted to in cases even within the remedy by ejectment. The process by ejectment has been moulded by equitable construction so as to meet the merits and try the title, under every variety of circumstance; there remains but one impediment, the distinction of the legal and trust estate; if that distinction, so far as it is merely ideal, so far as there is not in substance any trust to be performed, were removed, the remedy would be perfect; and the time is come, when *the ejectment should be relieved from technicalities, and become the plain and simple proceeding for trial of title in all cases.*

The bar by limitation of time, entirely depends on the possession being *adverse* to the rightful claimant; what possession for this purpose is or is not adverse, will probably be found to depend too much on the circumstance of each case, to be capable of legislative definition. In general, the bar depends simply on the length of adverse possession, save that descent and discontinuance accelerate the bar of the possessory, the only easy practical remedy; and that a fine levied by or to any person having the *freehold*, by right or by



wrong, bars all who do not claim within five years after their title accrued, or disability ended.

Now it is difficult upon any true principle of property, in modern days, to justify the prescriptive title established in the very short period of five years, in the case of nonclaim upon a fine. The civil law permitted a positive title; to be acquired in land by prescription in ten years, against those who were present, and twenty years against those who were absent, and the prescription gave a positive title, but then prescription was of no avail, unless the person in whose favor the time began first to run, was a fair and honest possessor. The Code of France has adopted precisely the same rule. In Scotland, forty years possession, founded originally on a title by writing, not chargeable with falsehood, makes a positive title by prescription; and for servitudes a similar length of prescription is available, without writing.

The law of England makes no distinction whether the possession, if adverse, be founded on fair and honest acquisition, or the reverse; the descent from a wrong doer indeed, confirmed his possession, but in other respects, the more palpable was the wrong, where the possession was wrongful, the better was the

protection the law afforded it. It appears that equity will not aid the person against whom there has been an adverse possession, of twenty years, by compelling the discovery of the title of the person in possession. Thus it is assumed, that *bona* or *mala fides*, unless involving direct fraud, makes no difference in our law, with regard to prescription.

In this state of the law, it becomes of the first importance, upon every principle of justice and policy, to adopt some definite and uniform rule of prescription. The peculiar bar by fine, resting on no sound principles, will probably easily yield to any general revision of the subject. The period sanctioned by existing law is twenty years, and it will probably be deemed right to assume this as the ground-work, and admitting the present savings for disabilities, and all the existing rules by which the period is measured and governed, to consider *that* as the fixed limit for *negative prescription*.

But the great and important feature of the question yet remains ; — What is to be the limit for *positive prescription* ? It is idle now to contend, that the law does not admit of any title by positive prescription ; we have seen, that the law expressly does admit a

positive right of *possession* to be acquired in twenty years; upon the same principle it ought to admit, within some certain definite period a positive right of *property* to be acquired. Beyond the twenty years, although in name the right of property may not be barred, yet the means of enforcing it by real action, are so very precarious and obsolete, and the right itself is so partial and incomplete, that its existence in its present shape serves to mislead, without any solid advantage whatever.

The decision of the case of *Cholmondeley and Clinton*, is the land-mark by which the law, as far as that case applies, must be governed; and offers to the legislature the best and surest rule in dealing with this most important subject. The effect of that decision is, that in *all equitable titles*, embracing, as they do, perhaps more than half the property in the kingdom, *twenty years adverse possession is a positive title by prescription*. It can never be endured, that there is to be one law for one half of the land in the country, and another for the remainder; the great principle by which the system of equitable jurisdiction over trust estates is upheld, is that Equity in dealing with a trust estate, is governed by



analogy to the rules of law ; the equitable estate is the estate at law in a Court of Equity,—it is there, *the land*,—and the trustee is the mere instrument of conveyance. If then Courts of Equity, adopt the positive prescriptive title of twenty years possession, as the rule for equitable estates,—the law for all lands under equitable jurisdiction,—it is a very inconvenient state of the law to permit legal estates, lands under the jurisdiction of a Court of law, to be subject to a more extended period of limitation.

A short statement of the case of *Cholmondeley and Clinton*, may serve to give a clearer view of this point. An estate subject to a mortgage in fee was in settlement ; upon the death of a tenant for life, Lord Clinton took possession, claiming to be entitled, and received the rents ; it may be assumed for the present purpose, that at that time Mrs. Damer, as devisee under the will of *Lord Orford*, was the person really entitled ; she suffered twenty years to elapse without taking any proceedings at law or in equity, and it was held she was barred by length of time. The land being in mortgage, the title was equitable ; the Court considered the receipt of rents as adverse possession ; it adopted the principle, that every new right of action must be acted upon within

twenty years, that the adverse possession for above that period was a positive bar, and thus the estate being equitable gave a positive title to Lord Clinton. Had the title being *legal*, Mrs. Damer, as a devisee, never in possession, would not have been entitled to any remedy in a real action, but had she been claiming as heir, and in that character entitled to such a remedy, that would have made no difference in the decision. The decision was confirmed upon appeal to the House of Lords, and in giving judgment it was observed by Lord *Redesdale* that Courts of Equity never regarded the power of asserting a title at law by writs of right, but had always considered the provision in the statute of James, by which the period of limitation was twenty years, as that by which they were bound and had always acted.

In a subsequent case upon this same title, the Lord Chancellor, in deciding that the Court would not compel a discovery in aid of an ejectment which had been brought upon the expiration of a lease within twenty years after the right of *actual* possession had by that means accrued, observes, that *there having been an adverse possession of the EQUITABLE ESTATE for above twenty years*, the Court would not interfere, intimating a doubt



as to the right even at law to the remedy by ejectment in such a case.

Now this appears to leave the subject in a very inconvenient state; the prescriptive title by positive bar, as to all land under equitable jurisdiction by twenty years adverse possession, either actual or by receipt of rent, seems to be clearly established; and it cannot be justice that lands under the jurisdiction of Courts of law, should be governed by a different rule. It may be important to consider whether twenty years, in the case of constructive seisin, of possession not actual, but by mere receipt of rent, be a period of sufficient duration to confer a positive title. With much distrust of my own opinion it appears to me that such a period is not sufficient; but that the privilege of disability to married women, and persons in prison or beyond sea, is unnecessary and inconvenient. It may be reasonable that the period for establishing a prescriptive title to land by positive bar of all remedy, should be more extended than that which gives a title by actual adverse use, of a right of way, or common; at all events the matter comes before the legislature under circumstances, which for the security of every title in the kingdom, demand its best attention and deliberate consideration.



The Author cannot conclude this Inquiry, without expressing how fully he is sensible of the imperfect manner in which many parts of the subject have been treated; but without taking an extended, although cursory view of the principal points within the range of the Inquiry, he found it impossible to pursue with any satisfaction the line of argument which has been adopted, and which appeared alone calculated to place the matter of the inquiry fairly before the public. If the author entered on this inquiry, with an impression of its great importance, he rises from the discussion with the confirmed conviction, that the matter is in every way worthy of the fixed attention of the legislature, and that the existing state of the law affords every ground of encouragement, for the adoption of thorough legislative revision.

The spirit in which the revision has already been commenced, justifies the hope that at no distant day; the WHOLE OF OUR STATUTE LAW MAY BE CLASSED AND CONSOLIDATED, AND THE PRACTICE OF ALL OUR COURTS, AND EVERY LEGAL FORM, BE EFFECTUALLY SIMPLIFIED AND REFORMED.

THE END.

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1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that proper record-keeping is essential for transparency and accountability, particularly in financial matters. The text notes that without reliable records, it is difficult to track progress, identify issues, and make informed decisions.

2. The second part of the document outlines the various methods and tools used to collect and analyze data. It mentions the use of surveys, interviews, and focus groups to gather qualitative information, as well as statistical analysis and data visualization techniques to process quantitative data. The importance of ensuring the reliability and validity of the data sources is also highlighted.

3. The third part of the document describes the process of interpreting the results and drawing conclusions. It stresses the need for a systematic approach to data analysis, including identifying patterns, trends, and anomalies. The text also discusses the importance of considering the context and limitations of the data, as well as the potential for bias and error.

4. The fourth part of the document provides a summary of the findings and discusses the implications for future research and practice. It notes that the results suggest a need for further investigation into certain areas, particularly regarding the effectiveness of the interventions and the long-term outcomes. The text also offers recommendations for how the findings can be applied to improve existing programs and inform policy decisions.

5. The final part of the document includes a conclusion and a list of references. The conclusion reiterates the key points of the study and expresses confidence in the findings. The references list the sources of information used throughout the document, including academic journals, books, and other relevant materials.













